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# MASSACHUSETTS REPORTS

## 224

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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS

MAY 1916—SEPTEMBER 1916

HENRY WALTON SWIFT  
REPORTER

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**JUSTICES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.**

**HON. WILLIAM CALEB LORING.**

**HON. HENRY KING BRALEY.**

**HON. CHARLES AMBROSE DE COURCY.**

**HON. JOHN CRAWFORD CROSBY.**

**HON. EDWARD PETER PIERCE.**

**HON. JAMES BERNARD CARROLL.**

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**ATTORNEY GENERAL**

**HON. HENRY CONVERSE ATTWILL.**



IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

**CORRECTION OF ERROR IN 223 MASS.**

On page 585 of 223 Mass. the eighth line from the top now reads, "*J. P. Fagan*, for the Federal Trust Company, submitted a brief." This should read, "*J. E. Cotter & J. P. Fagan*, for the Federal Trust Company, submitted a brief."

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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WINFIELD H. PALMER *vs.* LOUIS E. GUILLOW, administrator.

Suffolk. November 16, 1915. — May 15, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Contract, Construction, Performance and breach, Failure of consideration, Implied. Practice, Civil, Judgment ordered under St. 1909, c. 236.*

In an action against an administrator for money had and received by his intestate to the use of the plaintiff, it appeared that the intestate, when he was attempting to perfect some machines for an inventor, procured money from the plaintiff, his friend, to defray his personal expenses until he could get some money from the invention and signed an agreement that the money should "be paid according to the following conditions in stock" of a corporation to be organized to manufacture and sell the machines "and in cash. Said " plaintiff "shall receive of me three hundred shares of the stock of the . . . company and as further recompense for the loan and accommodation I will set aside 1200 shares of my own holdings in said company, all the dividends on which shall be devoted to repaying said " plaintiff "three hundred dollars in cash." The intestate labored diligently but in vain to perfect the machines. The machines were a failure and no corporation ever was formed. *Held*, that by the provisions of the contract the plaintiff was to receive his pay in shares of the capital stock and in dividends on shares to be issued to the intestate, and in no other way; that the failure to form the corporation was no fault of the intestate, and that, the intestate having performed the contract to the best of his ability, the action could not be maintained because there was no failure of consideration for the contract.

It also was *held*, for the same reasons, that an action could not be maintained for breach of the contract by the intestate.

An action of contract, the declaration in which contained two counts, the first upon a contract in writing and the second for money had and received, was heard by a judge without a jury, and the defendant asked for certain rulings which applied to both counts. The judge made no disposition of the rulings, but ordered judgment for the plaintiff on the second count, and the defendant excepted. This court were of opinion that a judgment should have been ordered for the defendant upon the second count, and, it clearly appearing also that the plaintiff could not maintain his action upon the first count, *held*, that under St. 1909, c. 236, judgment should be entered for the defendant upon both counts.

CONTRACT, with a declaration in two counts, alleged to be for the same cause of action, as described in the opinion. Writ dated January 29, 1915.

In the Superior Court the case was heard by *Dubuque, J.*, without a jury. The material evidence is described in the opinion. At the close of the evidence, the defendant made thirteen requests for rulings, of which the following are material:

"1. On all the evidence the plaintiff cannot recover."

"4. The written contract is complete in itself and is conclusive between the parties.

"5. The plaintiff cannot recover for money had and received.

"6. In any event, the plaintiff is entitled to nominal damages only.

"7. The plaintiff is not entitled to recover unliquidated damages upon his first count."

"9. The plaintiff cannot rescind because it is impossible to restore the parties to their original situation.

"10. The deceased, by making diligent effort to carry out the enterprise, though it proved unsuccessful, performed a substantial part of his promise.

"11. The failure to deliver the stock was not on the evidence a substantial breach of the contract."

The bill of exceptions recites that the judge "failed to give" the rulings "and made no disposition thereof." A judgment was ordered for the plaintiff on the second count for \$300 with interest at six per cent from the date of the writ;" and the defendant alleged exceptions.

The case was argued at the bar in November, 1915, before *Rugg, C. J., Braley, De Courcy, Crosby, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

*L. E. Guillow, pro se.*

*W. P. Kelley, for the plaintiff.*

RUGG, C. J. This is an action of contract. The declaration contains two counts. The first is upon a special contract printed in a footnote.\* The second is for money had and received.

There was evidence tending to show that the plaintiff and Hemenway, the defendant's intestate (who will be called the defendant), were old friends; that the defendant, who was engaged in perfecting some machines, the invention of one Gosselin, applied to the plaintiff for \$300 to defray his personal expenses until he could get some money out of the invention; that the plaintiff handed it to him and received in return the contract; that at its end above the signature were the words, "with interest at six per cent from date hereof;" that through these words a line in ink was drawn by the defendant at the plaintiff's request, who told him he did not want interest if the money was to be returned and the stock given him; that there were thereafter frequent conversations between the parties about the machines; that the plan of the defendant and Gosselin was that, when the machines were made sufficiently efficient, a corporation to be called the Gosselin Company was to be organized to manufacture and sell them; that the machines were a failure, the corporation never was organized, and of course no stock was issued. The plaintiff testified that the "drift of" the agreement was expressed in the writing. The plaintiff testified that he did not talk with the defendant about the contract "because the company wasn't formed and he wasn't ready to pay it and I knew that." Gosselin, the inventor, testified that one of the machines had been substantially completed by Hemenway before his death, but that "on the other part which was essential to the completed machines, Hemenway had not been able to accomplish much." The adminis-

\* "\$300.

Boston, Mass., April 1, 1907.

Received of Winfield H. Palmer three hundred dollars to be paid according to the following conditions in stock of the Gosselin Company and in cash. Said Palmer shall receive of me three hundred shares of the stock of the Gosselin Company and as further recompense for the loan and accommodation I will set aside 1200 shares of my own holdings in said company, all the dividends on which shall be devoted to repaying said Palmer three hundred dollars in cash.

E. P. Hemenway."

trator of the defendant testified "that Hemenway worked diligently on the machines for several years after 1907, but that during the last two or three years of his life he worked on them much less; and that Hemenway, a short time before his death, had told him the machines were a failure, that he could not make a success of them."

This evidence establishes that the writing expressed all the terms of the contract by which the plaintiff handed \$300 to the defendant. The plaintiff does not testify to any other.

It is necessary to decide what that writing means when read in the light of the circumstances under which it was given. Plainly the \$300 was not a simple loan. The money was not advanced by the plaintiff to the defendant upon the latter's credit with the then present intent and purpose on the part of both that the money be repaid at some time in the future.

The plaintiff did not receive an unconditional promise to be paid money. He was to be paid in stock of the Gosselin Company and in cash. But the cash was to be derived from one source alone, namely, from the dividends upon twelve hundred shares of the defendant's stock in the same company. That three hundred shares of stock and the money derived from the dividends upon the other stock was the only payment to which the plaintiff was entitled under the contract. There is no provision for repayment to the plaintiff if the corporation is not formed and the stock is not issued. He is to be reimbursed only in one way and in no other. If the venture had been a success, the plaintiff would have been a sharer in its prosperity. He would have received three hundred shares in stock and the original principal wholly returned out of the dividends on twelve hundred other shares. He made no contract for the return of the principal in the event of a failure of the scheme.

Both parties knew that Hemenway was working to perfect the machines and to make them useful and salable, so that the corporation to manufacture and sell them might be organized and its stock have value. It was an implied condition of the contract that Hemenway should use his faithful efforts to complete the machines. If he had utterly failed in undertaking to perfect the machines, doubtless there would have been a failure of consideration for the contract. But Hemenway did not refuse to go forward. According to all the evidence, he labored diligently for almost six

years in the performance of his part of the contract. It was no fault of his that the corporation was not formed and its stock issued. The reason was that the venture, so far as he was concerned, failed in spite of all he could do.

The evidence discloses no failure of consideration such as warrants recovery of his money by the plaintiff. There is a failure of consideration when a plaintiff pays a defendant for property sold to him by the defendant to which the latter has no title. *Rice v. Goddard*, 14 Pick. 293. *Clafin v. Godfrey*, 21 Pick. 1, 9. There is a like failure of consideration when money is paid by a plaintiff to a defendant for an agreement by the defendant to perform acts which he totally fails to perform. \**Briggs v. DePeiffer*, 214 Mass. 52, 58. Doubtless there may be other classes of cases of total failure of consideration. But the case at bar is not of that kind. The plaintiff gave his money to the defendant to be used to enable him to live while he was working for the success of a highly speculative project, and agreed to take his recompense out of that project when it reached the incorporation and dividend paying stage. The defendant used his best endeavors to bring the project to that stage, but failed. The time never has arrived and now, since the death of Hemenway, never can arrive when according to the terms of his contract the plaintiff is entitled to receive anything from the defendant. The real complaint of the plaintiff is not that the consideration for his contract has failed, but that the adventure on which he embarked has failed.

What has been said disposes of both counts in the plaintiff's declaration, which are for the same cause of action, without discussing the other defences pleaded.

The exceptions must be sustained and in accordance with St. 1909, c. 236, judgment may be entered for the defendant.

*So ordered.*



GIUSEPPE FONDI vs. BOSTON MUTUAL LIFE INSURANCE  
COMPANY.

Essex. November 17, 1915. — May 15, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Insurance, Life. Evidence, Presumptions and burden of proof, Best evidence, Public records. Practice, Civil, Rulings and instructions, Exceptions, Verdict.*

In an action upon a policy of life insurance containing a provision which reads, "Conditions. Provided, however, that no obligation is assumed by said Company prior to the date hereof, nor unless on said date the insured is alive, in sound health . . .," proof that on the date of the policy the insured was in sound health is a condition precedent to recovery, and the burden of proving compliance with that condition rests upon the plaintiff.

Proof of the performance of a condition precedent of a policy of life insurance is not affected by St. 1907, c. 576, § 21, providing in substance that "No . . . warranty made in the negotiation of a . . . policy of insurance by the assured . . . shall be deemed material or defeat or avoid the policy . . . unless . . . made with actual intent to deceive or unless the matter . . . made a warranty increased the risk of loss."

An error of a judge presiding at the trial of an action upon a policy of life insurance, in instructing the jury that the burden of proof rested upon the defendant to show that the policy had been avoided by breach of a condition precedent that at its date the insured was in good health, is not cured by a further instruction that, if it appeared to the minds of the jury that the insured "was not in sound health at the time when the policy was taken out, then by the express terms of the policy there could be no recovery."

It is proper, at the trial of an action upon a policy of life insurance where a material issue is, whether the insured at the date of the policy was in sound health, to refuse to admit as evidence a copy of a card, the original of which had been destroyed, which was kept by the State board of health, not as a public record in the sense of R. L. c. 35, § 5, but as a part of the board's voluntary activities without legislative requirement, and which purported to state that a sample of sputum of the insured had been examined by the bacteriologist and found to be tuberculous, especially when it does not appear that the bacteriologist who made the test might not be called as a witness.

If a jury, in an action where the plaintiff is entitled to interest, return a verdict for the plaintiff in a certain sum "with interest," the presiding judge has power, before the verdict is recorded, to order the amount of the verdict to be amended by the addition of interest.

RUGG, C. J. This is an action of contract whereby the plaintiff seeks to recover on two policies of insurance on the life of Edwardo Contestabile. Each policy contained among other condi-

tions the following: "Conditions. Provided, however, that no obligation is assumed by said Company prior to the date hereof, nor unless on said date the insured is alive, in sound health. . . ." There was evidence tending to show that on the date of each policy the insured was not in sound health, but was suffering from tuberculosis. In this state of the evidence the jury were instructed that "The burden of proof in this case to show that this policy has been avoided by breach of the condition referred to rests upon the defendant. That is, unless he satisfies you by a fair preponderance of the evidence that the conditions of the policy are broken, then you should bring in a verdict for the plaintiff." Exception was saved to this instruction.

The instruction was erroneous. The correct principle of law was called to the attention of the presiding judge\* by the defendant's requests for rulings, to the effect that, in order to recover, it was necessary for the plaintiff to show as to each policy by a fair preponderance of the evidence that on its date the insured was in sound health. When it is made a condition precedent to the taking effect of a policy of insurance as a binding contract, that the insured shall be in sound health on its date, then the burden of proving compliance with that condition rests on the plaintiff. *Barker v. Metropolitan Life Ins. Co.* 188 Mass. 542, 547. *Lee v. Prudential Life Ins. Co.* 203 Mass. 299, 301. *Everson v. General Accident, Fire & Life Assurance Corp. Ltd.* 202 Mass. 169, 172, 173. Proof of performance of a condition precedent of the policy is not affected by St. 1907, c. 576, § 21, to the effect that "No . . . warranty made in the negotiation of a . . . policy of insurance by the assured . . . shall be deemed material or defeat or avoid the policy . . . unless . . . made with actual intent to deceive or unless the matter . . . made a warranty increased the risk of loss." The distinction between a warranty and a condition precedent in connection with a contract is plain.

The error of the misdirection touching the burden of proof was not cured by the further instruction that if it appeared to the minds of the jury "that the man was not in sound health at the time when the policy was taken out, then by the express terms of the policy there could be no recovery." This sentence contains no reference to the burden of proof.

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\* Fox, J.

Requests twelve and thirteen, to the effect that if the insured had some disease of the lungs on the date of either policy, there could be no recovery, were given in substance.

A physician who had examined the insured during December, 1908, when the policy of earlier date was issued, testified to sending some sputum, given him by the insured, to the State board of health. The defendant, through one of its employees, then offered in evidence a copy of a card from the office of that board, together with evidence that he had seen the original which had been destroyed. The card with its inferences appeared to show that the sputum sent by the examining physician had been tested by the "bacteriologist" and found to be tuberculous. It appeared that examinations and records of this sort were made and kept by the State board as a part of its voluntary activities without legislative requirement. It was not a public record in the sense of R. L. c. 35, § 5. It did not appear that the bacteriologist who made the test might not have been called as a witness. *Cashin v. New York, New Haven, & Hartford Railroad*, 185 Mass. 543, 546. It did not relate to matters as to which records were required to be kept. *Butchers Slaughtering & Melting Association v. Boston*, 214 Mass. 254, 259. This copy was excluded rightly. *Allen v. Kidd*, 197 Mass. 256, 259. *P. Garvin, Inc. v. New York Central & Hudson River Railroad*, 210 Mass. 275, 279. *Commonwealth v. Borasky*, 214 Mass. 313, 317. *Jewett v. Boston Elevated Railway*, 219 Mass. 528, 532. *Nichols v. Commercial Travellers' Eastern Accident Association*, 221 Mass. 540, 547.

The plaintiff was entitled to interest on the verdict. The jury returned a verdict for a sum "with interest." \* While they were

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\* The full statement in the bill of exceptions of the facts as to the amendment of the verdict is as follows: "The jury returned a verdict for the plaintiff on the first and second counts of the plaintiff's declaration, which said verdict was sealed as the court had adjourned while the jury were deliberating. When the court came in the following morning the jury were all present and the foreman announced the verdict in the usual manner, which said verdict read as follows: 'The jury finds for the plaintiff in the sum of seven hundred fifty dollars (\$750) with interest.' The court instructed the following words to be added after the word 'interest' to the finding of the jury: 'Amounts to 87 and 75-100 making in all 837 and 75-100.' The jury then affirmed the verdict. Counsel for the defendant duly excepted to the amending of the verdict after the jury had separated."

in their seats and before the verdict was recorded, it was amended by direction of the judge by the addition of interest, which then was affirmed by the jury and recorded. In this there was no error. *Minot v. Boston*, 201 Mass. 10. *Whitney v. Commonwealth*, 190 Mass. 531, 540. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 387, 388.

*Exceptions sustained.*

*J. P. S. Mahoney*, for the defendant.

*M. A. Sullivan*, for the plaintiff.

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### IN THE MATTER OF HORATIO N. ALLIN.

Suffolk. November 17, 1915. — May 15, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Attorney at Law, Disbarment. Disbarment Proceedings.*

Disbarment proceedings are not begun by a writ, and the usual form of procedure, which here was followed, of filing a petition in the Superior Court setting forth certain causes for disbarment, upon which an order of notice to appear and show cause why his name should not be stricken from the roll is issued to the accused attorney in the usual form signed by the clerk and, together with a copy of the petition, is delivered in hand to such attorney, violates no constitutional right and no statutory provision.

Where, after a hearing on the merits upon disbarment proceedings in which the petition alleged only one ground for disbarment, the trial judge made findings of fact in which he found that the ground alleged in the petition was "abundantly established," and also found two other grounds for disbarment which were not alleged in the petition, but made an order for disbarment based on the single matter alleged in the petition, it was *said*, that it was not necessary to determine whether, after a trial in which the accused attorney had had ample opportunity to be heard on all matters, the order for disbarment might not have been based on one or both of the grounds not included in the petition, or to determine *whether* the petition under the circumstances might not have been amended to conform to the evidence.

Where an attorney at law brought an action for a woman client against certain defendants, and the action was settled by the entry of judgment for the defendants upon an agreement in writing signed by this attorney without the knowledge or special consent of his client and without giving her notice of it after it was entered, and where such entry of judgment was a part of the consideration given

by such attorney for an option to him from the defendants to purchase certain real estate, and the attorney concealed this transaction from his client until she learned of it at some time later and brought a suit against him to enforce her rights, an order for the disbarment of the attorney is warranted.

In disbarment proceedings based on the facts stated above, the circumstance, that the real estate speculation entered into by the attorney through the option thus acquired by him turned out disastrously for him, has no bearing upon his want of faithfulness to his client.

If in such disbarment proceedings it should have been found that the attorney originally had authority from his client to dispose of her case as he deemed best, this would not justify his want of fidelity to her.

The facts narrated above also were *held* to have justified a further finding made by the trial judge that the attorney was "guilty of gross misconduct in his office."

The provisions of R. L. c. 173, §§ 79, 109, that in an action at law where exceptions have been filed judgment shall not be entered unless the exceptions are adjudged immaterial, frivolous or intended for delay, have no application to disbarment proceedings, in which an order for the disbarment of the accused attorney properly may be entered while exceptions taken by him are pending.

A judge of the Superior Court is not disqualified from hearing a petition for the disbarment of an attorney at law by reason of such judge's membership in the bar association that instituted the proceedings. Following *Boston Bar Association v. Casey*, 211 Mass. 187.

The denial of a motion for a rehearing in disbarment proceedings here was *held* to have been a matter wholly within the discretion of the trial judge.

In disbarment proceedings, where an order for the disbarment of the accused attorney has been held by this court to have been warranted and a finding that the attorney was guilty of gross misconduct in his office also has been held to have been warranted, it is not a question of law for determination by this court whether an absolute removal or merely a suspension from practice for a specified period was required in order that the demands of justice might be met and the protection might be afforded to the public which only an upright bar can give.

RUGG, C. J. This is a proceeding for the disbarment of an attorney at law.

1. The motion to dismiss was denied and overruled \* rightly. It was based on the ground that the process employed in bringing the matter to the attention of the court was not in accordance with the Constitution and statutes of this Commonwealth and with the clauses of the Constitution of the United States guaranteeing due process of law and equal protection of the laws, in that the notice issued to him was not under the seal of the court and did not bear *teste* of the first justice of the court. Const. Mass. c. 6, art. 6. R. L. c. 166, § 1; c. 167, §§ 15, 19, 20, 21.

A petition was filed in the Superior Court setting forth certain causes for disbarment, upon which issued an order of notice to

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\* *Wait*, J.

appear in the usual form signed by the clerk. The return of service shows that a copy of the petition with the order of the court thereon was delivered in hand to Mr. Allin. This was in accordance with a general practice.

A proceeding for the removal of an attorney at law from his office is not instituted, prosecuted or forwarded by a writ. It is not "founded on legal process according to the signification of the words '*per. legem terræ*,' as used in Magna Charta," and in the Constitution and statutes. "At common law an attorney was always liable to be dealt with in a summary way. . . . No complaint, indictment or information was ever necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer. . . . Sometimes they are founded on affidavit of the facts . . . ; in other cases, by an order to show cause why he should not be stricken from the roll; and when the court judicially know of the misconduct of an attorney, they will of their own motion order an inquiry to be made . . . without issuing any process whatever." *Randall, petitioner*, 11 Allen, 473, 479. In the respect that no writ or process issues, this proceeding resembles a petition for a writ of mandamus and for other extraordinary writs. *Taylor v. Henry*, 2 Pick. 397, for preliminary injunction and numerous other orders or rules to show cause. See *Kennard v. Louisiana*, 92 U. S. 480. No constitutional right of Mr. Allin has been infringed and no statutory provisions violated by this method of procedure. *Boston Bar Association v. Casey*, 211 Mass. 187, 193. *Ex parte Wall*, 107 U. S. 265-267, 271, 272. *Randall v. Brigham*, 7 Wall. 523, 539, 540. *Thatcher v. United States*, 129 C. C. A. 255, 260.

2. A finding was made after a hearing on the merits, to this effect: "He has wittingly promoted and sued a groundless suit; he has done falsehood in court, and he has not conducted himself in the office of an attorney within the courts with due fidelity to his client. While the first two of these specifications have appeared from the evidence, they are not made the ground of accusation against him in the petition filed in this matter. The third specification is the basis of the proceeding against him and is abundantly established." It is not necessary to determine whether, under the principles of procedure already alluded to which are discussed at length in the cases heretofore cited, the court, after

a trial in which the accused attorney had had ample opportunity to be heard on all matters, might not have proceeded on the first two specifications, or whether the petition might not have been amended under the circumstances to conform to the evidence, *Boston Bar Association v. Greenhood*, 168 Mass. 169, 184, for the judge confined his action in making the order for disbarment to the ground specified. The statement of the other findings constituted no error. They all relate to the single matter of the conduct of the action brought for Mrs. Kelly by Mr. Allin. That whole transaction from its inception to its conclusion was a proper matter of investigation.

3. The finding to the effect that there had been want of fidelity to his client, Mrs. Kelly, in his conduct as attorney toward her, was warranted. It is not necessary to recite the evidence in detail. It was somewhat conflicting. A careful perusal of it convinces us that there was sufficient testimony to justify the conclusion reached. *Boston Bar Association v. Scott*, 209 Mass. 200, 203. Summarily stated, there is evidence which, if believed, as it must have been by the trial judge, showed that an action was brought in the name of Mrs. Kelly against certain defendants. That action was settled by the entry of judgment for the defendants by agreement in writing, signed by Mr. Allin as her attorney, without the knowledge or special consent of the plaintiff, and without notice to her, as a part consideration for the procurement of an option to Mr. Allin from the defendants, to purchase real estate. The real estate subsequently was conveyed to him in accordance with the option. This transaction was concealed from Mrs. Kelly. She learned of it some time later and brought suit to enforce her rights. See *Kelly v. Allin*, 212 Mass. 327. The circumstance that the real estate speculation has turned out disastrously to Mr. Allin has no bearing upon his want of faithfulness to his client. Whether as an isolated fact the attorney had original authority given to him by Mrs. Kelly to dispose of her case as he deemed best is not decisive, for even if this were so, it did not justify the course which on all the evidence it has been found that he pursued.

4. The facts narrated in the finding as to want of fidelity to the client, supported as they are by the evidence, justify the further finding that the attorney "has been guilty of gross misconduct in his office."

5. The entry of the order for disbarment\* after the finding of facts, without further notice to the attorney, discloses no error of law. *Boston Bar Association v. Casey*, 213 Mass. 549, 556. He already had been fully heard. There was no occasion for an additional hearing upon the precise order to be entered in view of the findings. The entry of the order was not like the imposition of sentence in criminal cases. R. L. c. 173, §§ 79, 109, are irrelevant.†

6. The judge of the Superior Court was not disqualified by reason of membership in the Boston Bar Association. That question was settled after a full discussion in *Boston Bar Association v. Casey*, 211 Mass. 187. That such membership is not a disqualification to sit in disbarment proceedings instituted by such associations also was held in *Ex parte Alabama State Bar Association*, 92 Ala. 113, and *Bowman's Case*, 67 Mo. 146.

7. The denial of the motion for a rehearing presents no question of law. That was wholly a matter of discretion with the trial judge.

8. The general motion to vacate the judgment was denied rightly. There is no error of law upon the record in the respects there specified. The contention that the whole form of procedure was wrong has no foundation. *Randall, petitioner*, 11 Allen, 473.

9. Whether a suspension from practice for a specified period, or an absolute removal, was required in order that the demands of justice might be met and the due protection afforded to the public which only an upright bar can give, presents no question of law for our determination. *Boston Bar Association v. Casey*, 196 Mass. 100, 111.

10. The right of an attorney to practise his profession is precious and ought not to be taken away except after a full hearing and a fair trial. Courts should be sedulous to see that there is abundant opportunity for answering every charge if it can be an-

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\* This was entered on March 30, 1915, by order of *Wail, J.*, and was as follows: "It is ordered and adjudged that the respondent, Horatio N. Allin, be, and he hereby is, removed from the office of an Attorney at Law within this Commonwealth."

† R. L. c. 173, § 79, provides that, where exceptions have been filed, "judgment shall not be entered unless the exceptions are adjudged immaterial, frivolous or intended for delay." Section 109 provides for the entry of judgment where the presiding judge finds that the exceptions taken are immaterial, frivolous or intended for delay.



swered and that no substantial error of law is committed in the course of the proceeding. A careful study of the present record convinces us that there is no occasion for reversing any order or sustaining any exception.

*Exceptions overruled. Interlocutory orders and order of removal from the office of attorney at law affirmed.*

*H. N. Allin, pro se.*

*G. D. Burrage, for the petitioner.*

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CHESHIRE NATIONAL BANK vs. CHARLES W. JAYNES & trustees.

Suffolk. November 29, 1915. — May 15, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

*Jurisdiction, Non-resident defendant. Practice, Civil, Special appearance, Law of trial. Judgment. Waiver.*

Construing together R. L. c. 170, § 1, and §§ 6 and 9 of the same chapter, the meaning is that, where an effectual attachment of property of a non-resident defendant has been made, the best kind of notice which can be given under the circumstances shall issue, in order to afford the non-resident defendant an opportunity to come into court and be heard on the question whether the property so attached ought to be held to satisfy a judgment in accordance with the terms of § 1.

If a non-resident defendant, on whom no personal service has been made but whose property has been attached by trustee process, appears specially and answers and defends the case for the sole purpose of protecting his rights in the goods, effects and credits in the hands of the alleged trustee without submitting himself generally to the jurisdiction of the court, he has a right to be heard in protection of his property thus attached, and the judgment rendered, if against him, will be valid only to secure the application of the attached property to the satisfaction of the judgment.

In the case stated above a judgment in the defendant's favor would be no bar to a further prosecution of the plaintiff's claim against other property or against the defendant personally in case an effectual attachment or personal service afterwards should be made.

Where a non-resident defendant, on whom no personal service had been made but whose property had been attached by trustee process, appeared specially for the sole purpose of protecting his rights in the attached property, but the trial judge ruled that if the defendant desired to contest the case he must answer generally and submit himself to the jurisdiction of the court, and the defendant

then, after having excepted to the ruling of the judge, answered generally and filed cross interrogatories for the taking of a deposition without further questioning the jurisdiction of the court, the defendant by this compliance with the ruling of the judge, which until reversed was the law of the trial, did not waive his special appearance nor his exception based on it.

The provision of R. L. c. 173, § 118, relates only to the effect of a general appearance and answer to the merits where the defendant's rights have not been saved by previous pleadings.

RUGG, C. J. This is an action of contract brought by a national banking corporation domiciled in the State of New Hampshire against a resident of the State of Connecticut, upon whom no personal service has been made but whose property has been attached by trustee process under the statute making provision for reaching the property of a non-resident. R. L. c. 170. The defendant filed a special appearance, whereby he has undertaken by apt words not to submit himself generally to the jurisdiction of the court, but only so far as is necessary in order to protect his interest in the goods, effects and credits in the hands of the alleged trustees. In proceedings, which need not be narrated in detail, the Superior Court\* has ruled that a non-resident defendant could not "appear, answer to the merits and defend the case for the purpose of protecting his rights in property trustee or attached and at the same time by 'special appearance' repudiate the jurisdiction of the court. If he is in court claiming its protection upon the merits of the case, he must submit to the obligations which the court places upon every litigant before it." The correctness of this ruling is challenged.

This precise question does not appear to have been decided. It has been determined that a valid personal judgment cannot be rendered against a non-resident defendant who is not served with process within the State and who does not appear. When property of a non-resident defendant is attached within the State, valid judgment may be entered, enforceable against such property, but possessing no further validity unless such non-resident defendant is served personally with process within the State, or appears. *Lowrie v. Castle*, 198 Mass. 82, 89. *Eliot v. McCormick*, 144 Mass. 10. *Pennoyer v. Neff*, 95 U. S. 714. *Freeman v. Alderson*, 119 U. S. 185. A non-resident defendant may ignore the proceedings

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\* By *Morton, J.*

in the courts of another jurisdiction when not served with process in that other jurisdiction and when no valid attachment of his property has been made. When attempt is made to affect his rights by judgment obtained in the absence of service of process or attachment of property, he may show its invalidity in the courts of any forum, either under the "full faith and credit" clause of the federal constitution or under general principles of international comity. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 206, 214. *Brown v. Fletcher*, 210 U. S. 82. Perhaps it would be competent for the Legislature to enact, without violating any provision of the federal constitution, that no one may voluntarily appear in our courts to contest any question there pending, even when some of the property is held under attachment, without at the same time submitting himself wholly to the jurisdiction of our courts for all purposes of the proceeding. *York v. Texas*, 137 U. S. 15. *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 272. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 426.

But that question is not now presented and expressly is left open. R. L. c. 170, § 1, which governs this matter, makes no such provision.\* This section has been construed with some strictness. *Roberts v. Anheuser Busch Brewing Association*, 215 Mass. 341. Its final clause does not deny full effect to a judgment rendered after a general appearance, even without service. *Gahm v. Wallace*, 206 Mass. 39. But it does not disclose a purpose to impose upon a non-resident defendant the burden of entering a general appearance in order to protect his property rights so far as they are put in peril by effectual attachment of his property upon the original writ. It does not by apt words cover a situation like that now presented. So far as there is implication from the words used, it seems to be that the action shall not be maintained without service with process within this Commonwealth (unless there is

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\* That statute is as follows: "Section 1. A personal action shall not be maintained against a person who is not an inhabitant of this Commonwealth unless he has been served with process within this Commonwealth or unless an effectual attachment of his property within this Commonwealth has been made upon the original writ, and in case of such attachment without such service, the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise."

voluntary general appearance) except so far as it may affect property held under effectual attachment. The provisions for notice to a non-resident defendant in §§ 6 and 9 of the same chapter, do not manifest a purpose to compel him to appear generally if he appears at all. Indeed, reading §§ 1, 6 and 9 together, and giving them all appropriate force, they are quite satisfied by interpreting them to mean that when effectual attachment of property of a non-resident is made, the best kind of notice which can be given under the circumstances shall issue in order to afford him opportunity to come into court and be heard on the question whether the property so attached ought to be held to satisfy a judgment in accordance with the terms of § 1. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394. "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement." *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, 193.

Treating the question as one of general law, quite uncontrolled by statute, the same result is reached. It was said by Chief Justice Parsons in *Bissell v. Briggs*, 9 Mass. 462, at page 468, "In order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties. To illustrate this position, it may be remarked that a debtor living in Massachusetts may have goods, effects, or credits, in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, trustee, or garnishee, of his debtor; and on recovering judgment, those goods, effects, and credits, may lawfully be applied to satisfy the judgment; and the bailiff, factor, trustee, or garnishee, if sued in this State for those goods, effects, or credits, shall in our courts be protected by that judgment, the court in New Hampshire having jurisdiction of the cause for the purpose of rendering that judgment, — and the bailiff, factor, trustee, or garnishee, producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects, and credits, are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this State to obtain satisfaction, he must fail, because the defend-

ant was not personally amenable to the jurisdiction of the court rendering the judgment. And if the defendant, after the service of the process of foreign attachment, should either in person have gone into the State of New Hampshire, or constituted an attorney to defend the suit, so as to protect his goods, effects, or credits, from the effect of the attachment, he would not thereby have given the court jurisdiction of his person; since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one State, and having effects in another State, to make himself amenable to the courts of the last State, that he might defend his property there attached." This decision was one of the earliest upon that subject in this country. It always has been recognized as a leading authority. See *Pennoyer v. Neff*, 95 U. S. 714, 731. While the allusion to the injustice of requiring a non-resident to surrender himself wholly to the jurisdiction of the courts of a foreign State, in order to defend his property there attached, was by way of illustration rather than exact adjudication, it was employed to illuminate an essential step in the reasoning by which the decision was reached, and therefore was something more than a mere *obiter dictum*. It states a sound principle. It is decisive of the question at bar.

It may be urged that to reach this conclusion is to impair the doctrine of *res judicata*, in that it compels a plaintiff to try the merits of his case and be barred by his failure, while no such decisive result inheres in defeat to the defendant. But this consequence does not follow. It is elementary law that the doctrine of *res judicata* does not operate as an estoppel unless it is mutual and affects both parties alike. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 217. *Bigelow v. Old Dominion Copper Mining & Smelting Co.* 225 U. S. 111, 127. In a situation like that at bar, the plaintiff puts his cause in issue no further than does the defendant. The bar of whatever judgment may be rendered, where a non-resident defendant appears specially merely for the purpose of protecting his interest in attached property, extends no further against the plaintiff than it does against the defendant. It relates only to the property of the defendant held under effectual attachment. The record of the judgment and the form of the execution when rendered against the defendant explicitly show this. It runs only against the property so attached, and not otherwise. The

record of the judgment when against the plaintiff should be equally categorical in showing that the plaintiff has failed to establish his case only against the property attached, and not that he has failed generally to establish a cause of action against the defendant. In such case the question of the general liability of the defendant to the plaintiff has not been put in issue, because the defendant has chosen to rely on his strict right by confining his appearance to the protection of the property alone and not to submit himself to the general jurisdiction of the court. When a defendant pursues this course he cannot at the same time claim the boon of general judgment if he wins, and the shelter of his special appearance if he loses. He cannot gamble with jurisdiction and invoke its benefit if favorable and repudiate its force if adverse. He must select his ground in advance and abide by the issue. If he stands only upon the special ground, he is entitled upon success only to a judgment which protects that property but which goes no further and will afford no shield against further prosecution of the plaintiff's claim against other property or against him personally, provided effectual attachment or personal service may be made.

The plaintiff, by instituting his action and making the effectual attachment of property, offers to the defendant the alternative, first, of coming into court generally and settling all issues by submitting to the jurisdiction of the court with the attendant advantage of ending that cause of action by a final judgment, or second, of appearing specially and protecting only the property attached and settling only that question and nothing else. The adjudication will be exactly commensurate with the alternative accepted by the defendant. This result is one of fairness and justice to both parties.

It is contended that because the defendant, after the entry of the order of the Superior Court to the effect that he could not appear specially but must submit to the jurisdiction generally if he desired to make any contest, answered generally attempting to continue his special appearance and also filed cross interrogatories for the taking of a deposition without questioning the jurisdiction, he has waived his special appearance and has in fact submitted himself generally to the jurisdiction of the court. But this contention cannot be supported. After having raised the point seasonably, he did not waive it by proceeding in accordance

with the rulings of the court, which until reversed were the law of the trial. *Walling v. Beers*, 120 Mass. 548. *Commonwealth v. Retkovitz*, 222 Mass. 245, 253. *Harkness v. Hyde*, 98 U. S. 476. *Southern Pacific Co. v. Denton*, 146 U. S. 202. *Davis v. Cleveland, Cincinnati, Chicago & St. Louis Railway*, 217 U. S. 157, 174. There is nothing inconsistent with this in R. L. c. 173, § 118, which relates only to a general appearance and answer to the merits where rights have not been saved by earlier pleadings.

It is not necessary to determine whether the allowance of the amendment to the record was within the power of the Superior Court or whether there was error in other respects. The questions which have been discussed are decisive of the issues here raised.

*Exceptions sustained.*

*E. B. Chapin*, for the defendant.

*J. E. Benton* (of New Hampshire) & *R. E. Buffum*, for the plaintiff.

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ARTHUR P. TEELE, executor, *vs.* ROCKPORT GRANITE COMPANY.  
SAME *vs.* SAME.

Suffolk. January 10, 1916. — May 15, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

*Corporation*, Change of nature of business, Rights of stockholder. *Equity Jurisdiction*, To enforce rights of stockholder upon change of nature of business of corporation, Laches. *Mandamus*. *Estoppel*.

A corporation, organized in 1864 for the purposes of "quarrying and preparing for the market of stone" in two specified towns, "and for selling the same," voted in 1914 to amend the statement of its corporate purposes to include, among others, beside those previously stated, a power to conduct its business both within and without the Commonwealth; the owning or leasing of lands containing stone "or other lands" for the purposes of the corporation; the entering into and carrying out of contracts for the construction of all kinds of structures so far as they might be advantageous for placing in the structures stone quarried or prepared by the corporation; the laying out and construction of railroad, telephone and telegraph lines and the construction, equipment, leasing and purchase of vessels of every nature and description, so far as such railroads, telephone and telegraph lines and vessels might be necessary and appurtenant to any purposes of the cor-

poration; the dealing in general merchandise, and the holding, purchasing or otherwise acquiring, and the selling or otherwise disposing of shares of the capital stock and securities of other corporations and the exercising of the right of ownership thereof. *Held*, that by such amendment the corporation "voted . . . to change the nature of its business," so that a stockholder who voted against such change might have payment for his stock in accordance with the provisions of St. 1903, c. 437, § 44.

And if, after such a stockholder has made the demand in writing specified in the statute and the corporation has refused payment for his stock, the stockholder appoints an appraiser and notifies the corporation, but it refuses to appoint an appraiser, the stockholder by a bill in equity may compel the appointment of such an appraiser and compliance by the corporation with the provisions of the statute. Such stockholder's rights are not precluded by the facts that, throughout the greater part of the period from the organization of the corporation in 1864 to the date of the vote referred to, the directors had done the things specified in the vote, had reported their doings to the stockholders and the stockholders had made no objection.

Nor are the rights of the stockholder affected by the fact that, while his suit in equity was pending, the corporation tendered to him and he received a dividend on his shares of stock.

Mandamus is not the proper remedy for compelling a corporation to comply with the provisions of St. 1903, c. 437, § 44.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on April 9, 1915; and,

**PETITION** for a writ of mandamus, filed in that court on March 5, 1915, both proceedings being brought by Mary P. Teele, a stockholder in the defendant corporation, to compel compliance by it with the provisions of St. 1903, c. 437, § 44.

That section is as follows: "A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with the provisions of section forty, who, at the meeting of stockholders, has voted against such action may, within thirty days after the date of said meeting, make a demand in writing upon the corporation for payment for his stock. If the corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered by the stockholder from the corporation in an action of contract. Upon payment by the corpora-



tion to the stockholder of the agreed or awarded price of his stock, the stockholder shall forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation."

The cases were consolidated and were heard together by *Brale*y, J. He found, among other facts, the following:

The purposes of the corporation since its incorporation in 1864 were "the quarrying and preparing for the market of stone in the towns of Rockport and Gloucester in the County of Essex and Commonwealth of Massachusetts, and for selling the same."

At a meeting of the stockholders of the defendant on November 6, 1914, Mary P. Teele alone voting in opposition, the purposes of the corporation were changed to read as follows:

"The purposes for which said corporation is established are to quarry stone and prepare the same for market, to buy, sell and deal in the same; to acquire, own or lease any lands containing stone, or other lands, for any purposes of the Company; to enter into and carry out contracts for the construction, alteration and repairing of all kinds of structures, including buildings, roads, docks, breakwaters, sea walls, aqueducts, canals and other water ways, so far as said contracts may be necessary or advantageous for placing in any such structures stone quarried or prepared by the Company; to lay out and construct railroads, railways, telephone and telegraph lines, and to construct, equip, purchase, sell, own or lease vessels of every nature and description, so far as such railroads, railways, lines and vessels may be necessary and appurtenant to any purposes of the Company; and as incidental to the other purposes of the Company to buy, sell, and deal in, general merchandise, and hold, purchase, or otherwise acquire, and sell or otherwise dispose of, shares of the capital stock and bonds or other securities of other corporations, and to exercise all the rights of ownership thereof, including the right of voting; to do all and everything necessary or convenient for the accomplishment of any of the purposes or objects or powers above mentioned or incidental thereto.

"The Corporation is to have the power to conduct its business both within and without the Commonwealth, and may have and maintain such offices as may be necessary therefor."

On November 10, 1914, the plaintiff made a demand upon the defendant in writing to make payment for her stock, which it re-

fused. The plaintiff then, on or about December 8, 1914, appointed an appraiser in accordance with the statute and duly notified the defendant. The defendant, however, refused to appoint an appraiser to fix the value of the plaintiff's shares of stock, and refused to take any action in the premises.

Since its organization the corporation frequently had bought and sold paving blocks and other forms of granite, which, on account of form, color, quality, or for other reasons, could not be furnished from its own quarries; frequently had leased and purchased lands containing stone, for the purposes of the company; had entered into and carried out contracts for the construction, alteration and repair of different structures, including roads, docks, breakwaters, and sea walls, in so far as said contracts were advantageous for placing in such structures, together with other materials necessary for their construction, the stone quarried or prepared by the company; from 1887 to the present time had built numerous lines of railroad for the purpose of connecting different parts of its various quarries, and also had built temporary lines of railroad for the purpose of delivering stone where delivery by water or by other ways had been found impracticable; also had built and maintained telephone and telegraph lines for the purpose of connecting various parts of its plant; also had owned and maintained, purchased and sold, constructed, built, and repaired, vessels of every nature and description used by it for the purpose of transporting stone and constructing sea walls and similar structures, having owned and operated a fleet of sloops, schooners, barges, tugs, exceeding twenty in number; had bought, sold and dealt in general merchandise at a general store maintained by the company for the convenience and advantage of its employees and for the profit of the company; at various times had acquired by purchase, or taken for indebtedness or held for security and sold and disposed of, shares of the capital stock and bonds or other securities of other corporations in connection with the business of the corporation.

All of the foregoing transactions were authorized by the directors and stockholders, to whom reports of the transactions were submitted each year, of which full statements appeared in the annual reports.

Mary P. Teele was represented by her attorney at some of these

meetings and received during her ownership dividends from time to time and made no protest regarding the business operations of the company. Her husband during his life acted as attorney for the corporation and was informed of all of its transactions during the time, and advised and assisted in the contracts for the building of various structures and the acquisition of various parcels of real and personal property and the exercise of all the other powers claimed by the corporation. But whether the information which he thus obtained was communicated to his wife did not appear.

It also appeared that, after the institution of these proceedings, Mary P. Teele received and cashed a check for a dividend upon her shares of stock in the defendant. The single justice found that, owing to the circumstances of her age and health, she did not thereby waive her rights as stated in these proceedings.

After the hearing before the single justice Mary P. Teele died and Arthur P. Teele, the executor of her will, was admitted to prosecute the case in her stead.

At the request of the parties the single justice reported the cases on the pleadings and the findings of fact for determination by the full court.

*F. L. Simpson, (G. E. Richardson with him,) for the plaintiff.*

*F. H. Tarr, for the defendant.*

RUGG, C. J. These two proceedings, one a suit in equity and the other a petition for a writ of mandamus, are brought by the plaintiff as a stockholder in the defendant corporation to compel compliance by it with the provisions of St. 1903, c. 437, § 44, on the ground that the defendant corporation has voted "to change the nature of its business."

The purposes for which the defendant was incorporated in 1864 were "The quarrying and preparing for the market of stone in the towns of Rockport and Gloucester in the county of Essex and Commonwealth of Massachusetts, and for selling the same." On November 6, 1914, in accordance with St. 1903, c. 437, § 44, its stockholders duly adopted the amendment to its corporate purposes.

The principles of law by which to determine whether acts and conduct are within or without the bounds of the power of a corporation have been the subject of adjudication and are not unfamiliar. A corporation has power to do only such business as it is authorized to do by its charter and no other. A corporation

cannot usurp functions not granted to it, nor stretch its lawful franchises beyond the limits of their reasonable intendment. It cannot engage in matters foreign to the objects for which it was incorporated. Its main business must be confined to those operations which appertain to the general purposes for which it was organized and which are defined in its charter. It is not clothed with all the capacities of a natural person or of an ordinary partnership. It is restricted to such as are conferred by its grant of the right to exist. Its lawful business may not vary materially from the objects for which it was created. It may, however, enter into contracts and engage in operations which, although not expressly nominated in its charter, are reasonably incident to its objects and subsidiary to its chief purpose. Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers. *Brown v. Winnisimmet Co.* 11 Allen, 326. *Davis v. Old Colony Railroad*, 131 Mass. 258. *Hutchkin v. Third National Bank of Syracuse*, 219 Mass. 234. *Jacksonville, Mayport, Pablo Railway & Navigation Co. v. Hooper*, 160 U. S. 514, 524, 526. *Meredith v. New Jersey Zinc & Iron Co.* 14 Dick. 257; affirmed in 15 Dick. 445. *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145, 153.

In the light of these principles a comparison may be made of the original powers of the defendant with those described in the amendment to them. The initial power of "quarrying and preparing for the market of stone" is enlarged to include buying, selling and dealing in the same, and to acquiring, owning or leasing lands containing stone or other lands. While doubtless it would be within the original power in case of emergency, or under exceptional or unusual circumstances, to purchase finished or other stone in order to fill its orders, *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315, there would be great difficulty in holding that it might regularly and as a part of its recognized everyday business conduct a buying and selling of stone quarried or finished by others. That is plainly within the purview of the amendment. The general contracting for the construction, alteration and repair of all kinds of structures, including buildings, docks, sea walls, breakwaters and canals, is a comprehensive

statement of powers respecting a department of industry which hardly could be described rightly as merely ancillary to the main business of quarrying and finishing stone for market. The circumstance that such contracts can be entered into only so far as "may be necessary or advantageous for placing in such structures stone quarried or prepared by the Company" is at most an exceedingly elastic limitation upon the broad power previously stated. It well may be that the nature of present conditions of trade is such that the contracting business may be profitably joined with that of quarrying and finishing stone. But that factor does not embrace the one as simply subsidiary to the other, or prevent the combination of the two from being a change from one. The construction of railroad, telephone and telegraph lines on its own estates, if necessary for the conduct of the principal business of quarrying and finishing, doubtless might be found to be incidental to it. But the same can scarcely be said respecting the power "to construct, equip, purchase, sell, own or lease vessels of every nature and description" so far as necessary for the purposes of the company. Navigation upon the high seas with every kind of craft, for the purpose of delivering its product, cannot with any due weighing of words and ideas be considered as incidental to the business of quarrying stone any more than it can be similarly regarded as to any other kind of manufacture or trade. The right to buy and sell shares of capital stock, bonds and securities of other corporations, and to carry on the business of dealing in general merchandise, seems to extend outside the ambit of quarrying. *Williams v. Johnson*, 208 Mass. 544. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 379. The power to conduct its business in places outside this Commonwealth, where it would not be under the protection of our laws, tends to disclose a purpose to alter the kind as well as to expand the amount of the business to be carried on.

Whatever may be said as to some of these new elements introduced into the chartered functions of the defendant by the amendment, if they stood alone, the collective effect of all of them is to work a "change in the nature of its business" within the meaning of those words as used in our statute.

The plaintiff is not barred by estoppel or laches. The present proceeding does not seek relief from acts to which the plaintiff has

given express or implied assent, but which are now averred to have been *ultra vires* the corporation. It rests wholly upon the privilege afforded by the statute. The plaintiff did not directly or indirectly assent to the vote of which complaint is now made. On the contrary, she opposed in the stockholders' meeting the vote amending the statement of corporate purposes and since has consistently asserted her rights under the statute. Because she may have profited by some of the acts of the defendant, now included in the amendment, before the vote was passed, does not bar her from enforcing the rights conferred by the statute growing out of that vote.

The bill in equity is the appropriate remedy. While relief by mandamus has been carried rather far in this Commonwealth, *Longyear v. Hardman*, 219 Mass. 405, 406, it is not adapted to the situation here presented. It is conceivable that in some instances injunction might be necessary. The flexibility of equity is better adapted to the wrong of which complaint is made and to effectuate the kind of relief which it is the purpose of the statute to confer upon the objecting stockholder, although perhaps no case exactly like this may be found among our decisions. See *New England Mutual Life Ins. Co. v. Phillips*, 141 Mass. 535; *Haupt v. Rogers*, 170 Mass. 71; *Gould's Case*, 215 Mass. 480.

An interlocutory decree may be entered for the plaintiff in the bill in equity according to the second prayer, directing the appointment of an appraiser by the defendant. Upon the finding of the appraisers being made, final decree may be entered for the amount by them ascertained, with costs. The petition for the writ of mandamus may be dismissed.

*So ordered.*

## GEORGE BURROUGHS vs. COMMONWEALTH.

Suffolk. January 11, 1916. — May 15, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Commonwealth. Actionable Tort. State Forester. Agency, Scope of authority or employment.*

The provisions of R. L. c. 201 do not permit the maintenance against the Commonwealth of a petition for the assessment of damages resulting from an ordinary tort committed by an officer or employee of the Commonwealth in the performance of duties prescribed by law.

The State forester, neither by the provisions of St. 1904, c. 409, § 2, which describe his general duties, nor by Res. 1915, cc. 2, 23, directing him "to provide employment for needy persons deemed by him to be worthy thereof . . . upon the improvement and protection of forests and in any other public work which may . . . be proper" in his opinion, is authorized to cut cord wood or clear brush upon the land of a private person for a price to be paid to the Commonwealth, and by his doing so the Commonwealth is not made subject to the liability of a private person engaged in private business to answer in damages for torts committed by its employees in such work.

The Commonwealth cannot be presumed to have consented to be impleaded in its own courts to answer for torts committed by the employees of one of its officers acting beyond the scope of authority conferred by law.

RUGG, C. J. This is a petition against the Commonwealth, brought under R. L. c. 201. It alleges in substance that the petitioner sustained damages to his property by fire set and negligently permitted to escape from their control by men employed by the State forester and engaged under his direction in cutting cord wood and clearing brush under the assumed authority of Res. 1915, cc. 2, 23, for the private benefit of one Streeter, the owner of land adjacent to the petitioner's land, who was to pay for the work done at so much per cord of wood cut. In substance the petition sets out an ordinary cause of action, sounding in negligence of servants in the course of the performance of their duties for their master. The Commonwealth demurred on the general ground that no cause of action was set forth in the petition, for the redress of which jurisdiction is given by the statute.\*

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\* The demurrer was sustained by *McLaughlin, J.*, who ordered judgment for the Commonwealth. The petitioner appealed.

It is familiar law that the sovereignty can be impleaded in its own courts only in the manner, to the extent and for the causes expressed in the statute granting consent thereto. *McArthur Brothers Co. v. Commonwealth*, 197 Mass. 137.

It has been held that while the terms of the statute now embodied in R. L. c. 201 are "full and comprehensive, it is not to be interpreted as imposing any new obligation upon the Commonwealth, or as creating a new class of claims for which a sovereignty never has been held responsible, but . . . 'to provide a convenient tribunal for the determination of claims of the character which civilized governments have always recognized, although the satisfaction of them has been usually sought by direct appeal to the sovereign, or, in our system of government, through the Legislature.'" *Nash v. Commonwealth*, 174 Mass. 335, 338. In view of this decision, the statute cannot be stretched to include damages for an ordinary tort committed by an officer or employee of the Commonwealth in the performance of duties prescribed by law. It expressly was adjudged in *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, that demands founded on the neglect or tort of ministerial officers engaged as servants in the performance of duties which the State as a sovereign has undertaken to perform, have never been recognized as the foundation of obligations. So far as the petition sets forth work of a public nature, it is concluded adversely to the plaintiff by these decisions.

Liability is urged on the ground that the work here alleged is not of a sovereign or public nature in any proper sense, but is in the nature of private business undertaken by the Commonwealth as it might be by any private contractor. It is plain, however, that there is no law authorizing the State forester to engage in the general business of cutting cord wood or clearing brush for private owners. Res. 1915, c. 2, directed the State forester "to provide employment for needy persons deemed by him to be worthy thereof. . . . The moneys authorized to be spent under the provisions of this resolve shall be spent upon the improvement and protection of forests and in any other public work which may in the opinion of the State forester be proper." Manifestly this language does not authorize the prosecution of work upon private lands for the benefit of private owners, but only upon that which may be described rightly as connected with "public work."



Res. 1915, c. 23, refers to c. 2, and adds nothing to it except an appropriation. The general duties of the State forester are set out in St. 1904, c. 409, § 2, in these words (so far as here material): "It shall be the duty of the State forester to promote the perpetuation, extension and proper management of the forest lands of the Commonwealth, both public and private. He may upon suitable request give to any person owning or controlling forest lands aid or advice in the management thereof. . . . The State forester shall have the right to publish the particulars and results of any examination or investigation made by him or his assistants as to any lands within the Commonwealth, and the advice given to any person who has applied for his aid or advice. Any recipient of such aid or advice shall be liable to the State forester for the necessary expenses of travel and subsistence incurred by him or his assistants." It is too plain for discussion that the right to give "aid or advice" confers no authority to go into the business of clearing forest lands or cutting wood or timber for individual owners. The duty to "promote the perpetuation, extension and proper management of the forest lands of the Commonwealth, both public and private," does not include the carrying out of advice, the execution of plans directed to that end, or the conduct of the general business of forestry. The statute contemplates encouragement of that business in the hands of private owners, not the prosecution of it by the State forester on lands privately owned.

Doubtless there was public work to which it may have been assumed that the appropriations might be applied. See, for example, Sts. 1909, c. 263; 1905, c. 381; 1907, c. 521; 1915, c. 124, as to the gypsy moth, R. L. c. 28, §§ 23-29, as amended by St. 1915, c. 162, as to the public domain, St. 1914, c. 720, as to State forests, and the statutes establishing the Wachusett, Mount Sugar Loaf and Greylock mountain reservations and other public parks.

It is not necessary to consider whether it would be possible for the Commonwealth under the Constitution to appropriate money raised by taxation for the purpose of entering into such a field of private business. See *Lowell v. Boston*, 111 Mass. 454; *Opinions of the Justices*, 155 Mass. 598; 182 Mass. 605; 204 Mass. 607; 211 Mass. 624. The statutes do not authorize the business enterprise under the management of the State which this aspect of the petition avers.

By no possibility can the Commonwealth be presumed to have consented to be impleaded in its own courts touching torts committed by the employees of one of its officers acting beyond the scope of any authority conferred by law.

*Judgment affirmed.*

*R. W. Hale & J. M. Maguire*, for the petitioner.

*C. W. Mulcahy*, (*A. E. Seagrave*, Assistant Attorney General, with him,) for the Commonwealth.

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BOSTON FISH MARKET CORPORATION vs. CITY OF BOSTON.

SAME v. COMMONWEALTH.

Suffolk. January 17, 18, 1916. — May 15, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Commonwealth Flats. Landlord and Tenant*, What constitutes relation, Construction of lease. *Tax*, Of leased land on Commonwealth Flats. *Constitutional Law*, Proportional and reasonable taxation, Equal protection of the laws. *Words*, "All annual taxes," "Municipal."

Under an indenture between the Commonwealth, acting by the board of harbor and land commissioners, empowered thereunto by R. L. c. 96, § 3, and the Boston Fish Market Corporation, throughout which the corporation is described as "lessee" and by the provisions of which, aptly phrased to create the relation of landlord and tenant, the Commonwealth "doth hereby demise and lease unto" the corporation certain parts of Commonwealth Flats for a term of fifteen years and gives to it extensive rights as to the erection of substantial buildings which would be expensive and valuable improvements to the property, and the corporation agrees to pay a certain sum as "rent," the corporation is not given a mere license under R. L. c. 96, § 17, but it is a lessee of the premises.

And, if the lessee named above uses the premises for the purpose of subletting portions of them to persons who deal in fish, the premises are "leased" to it "for business purposes," although it does not itself engage in a mercantile business; and therefore, under the provisions of St. 1909, c. 490, Part I, § 12, the premises are subject to taxation.

The general exemption from taxation of the property of the Commonwealth in St. 1909, c. 490, Part I, § 5, cl. 2, does not apply to those portions of the Commonwealth Flats that are "leased for business purposes," which are expressly subjected to taxation by § 12.

The mere fact, that the Commonwealth by St. 1909, c. 490, Part I, § 12, subjects some, but not all, of the land of which it is the proprietor to taxation when it is leased, is not a violation of c. 1, § 1, art. 4 of the Constitution of Massachusetts,

requiring that all property taxes must be "proportional and reasonable," and violates no constitutional right of any citizen.

For the same reasons that statute is not in contravention of the clause of the Fourteenth Amendment of the Constitution of the United States assuring "equal protection of the laws."

A provision in a lease by the Commonwealth to a corporation of a portion of the Commonwealth Flats, that the lessee "shall also pay . . . all annual taxes which may be assessed upon the premises leased. . . . By 'annual taxes,' as applied to the leased premises, is meant the annually recurring municipal tax, and not any betterment taxes for street construction or other special taxes or assessments," requires the lessee to pay all the tax as assessed under St. 1909, c. 490, Part I, § 12, the word "municipal" as here used including the county and State taxes.

PETITION, filed on September 4, 1915, for repayment of State and county taxes included in the taxes paid by the petitioner to the city of Boston under the circumstances described in the opinion; also

CONTRACT for taxes paid under protest under the circumstances described in the opinion. The first, second and fourth counts of the declaration sought recovery of the entire tax paid. The third count sought recovery only of the amount paid as county and State taxes. Writ dated November 1, 1915.

The Commonwealth demurred to the petition. The demurrer was sustained by *McLaughlin, J.*; and the petitioner appealed.

The action of contract was submitted to *McLaughlin, J.*, on an agreed statement of facts. He found for the defendant and, at the request of the parties, reported the case for determination by this court under the agreement that, if upon the agreed facts the plaintiff was entitled to recover on any count except the third, judgment was to be entered for the plaintiff in the sum of \$37,-211.20 and interest from August 25, 1915; if the plaintiff could recover only on the third count, judgment was to be entered for the plaintiff in the sum of \$8,440.34 and interest from August 25, 1915; if the plaintiff could not recover on any count of the declaration, judgment was to be entered for the defendant.

*J. N. Johnson, (M. F. Shaw with him,)* for the petitioner.

*J. P. Lyons,* for the city of Boston.

*W. H. Hitchcock,* Assistant Attorney General, for the Commonwealth.

RUGG, C. J. The petitioner seeks by these two different forms of procedure to recover taxes assessed as of April 1, 1914, and paid

by it in respect of land and buildings erected by it upon a portion of the South Boston flats. The legal title to the land is in the Commonwealth. The petitioner holds possession under an indenture duly executed between it and the Commonwealth, acting by the board of harbor and land commissioners, for a term of fifteen years from October 1, 1913. The taxes, which are the subject of these proceedings, were assessed under the assumed authority of St. 1909, c. 490, Part I, § 12,\* first enacted in St. 1904, c. 385.

1. The plaintiff is the lessee of the land for which it has been taxed within the meaning of the statute. It is described as "lessee" throughout the indenture under which it holds possession. That indenture is in the form of a lease.† It is aptly phrased to create the relation of lessor and lessee. The harbor and land commission had the power to execute a lease. R. L. c. 96, § 3. The plaintiff is given extensive rights as to the erection of substantial buildings, piers and a breakwater, which doubtless would be expensive and valuable improvements to the property; but these circumstances have no tendency to prevent its becoming a lessee in accordance with its express agreement to that end. The case is distinguishable from *Corcoran v. Boston*, 193 Mass. 586, where the possession was under a bond for a deed, and from *Lyon v. Cunningham*, 136 Mass. 532, where possession was taken under an agreement for a lease. The plaintiff is not a mere licensee under R. L. c. 96, § 17.

2. The plaintiff is a lessee for "business purposes" as these two words are used in the statute. The markets established by it and

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\* This section reads as follows: "The lands of the Commonwealth, situate in that part of the city of Boston called South Boston and known as the Commonwealth Flats, shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof, respectively, in the same manner as the lands and buildings thereon would be taxed to such lessees if they were the owners of the fee, except that the payment of the tax shall not be enforced by any lien upon or sale of the lands; but a sale of the leasehold interest therein and of the buildings thereon may be made by the collector of the city of Boston in the manner provided by law in case of non-payment of taxes for selling real estate, for the purpose of enforcing the payment of the taxes by such lessees to the city of Boston assessed under the provisions hereof."

† The indenture recited "That the said lessor doth hereby demise and lease unto the said lessee certain premises . . ." The plaintiff agreed to pay "rent" at the rate of \$35,000 yearly in equal quarterly instalments.

leased to its tenants for conducting the business of dealing in fish and sea foods demonstrate that the premises were leased to it for business purposes. The statute does not mean that the lessee must itself conduct a mercantile business upon the demised premises. It is enough if they are leased for the purpose of being devoted to business uses.

3. It is too plain for discussion that the general exemption from taxation of the property of the Commonwealth in St. 1909, c. 490, Part I, § 5, cl. 2, does not apply to property expressly subjected to taxation by § 12. The tax act is to be construed as an harmonious and consistent code.

4. The constitutionality of the section (§ 12) of the tax act here in question is assailed as being in conflict with the requirement that all property taxes must be "proportional and reasonable" found in c. 1, § 1, art. 4 of the Constitution. This contention is based on the fact that at the time this section of the tax act was enacted, the Commonwealth owned flats similar to these in South Boston, at East Boston, and other tracts about Boston Harbor and in other parts of the State, and also a part of the South Boston flats, which were not subject to taxation. The Commonwealth owned all these lands and flats in its capacity as the sovereign power. Naturally, and apart from express enactment or plain implication, property of the State is not subject to taxation. Instrumentalities of government are not deemed ordinarily subject to taxation in any form. *Worcester County v. Mayor & Aldermen of Worcester*, 116 Mass. 193. *Burr v. Boston*, 208 Mass. 537. *Opinion of the Justices*, 195 Mass. 607, 609. The sovereignty, being the owner of its property, has a right to do with it as it will with regard to subjecting it to taxation. While property held for a public use need not be made subject to taxation in order to render taxation of the people proportional and equal, if some property so held is made liable to taxation while other such property is not, no constitutional right of the citizen is infringed. The statute, in so far as it requires taxation of some of the property of the Commonwealth leased for purposes of general business, tends toward a closer approximation to equality of taxation than if all were freed from such imposts. It is not an arbitrary and capricious subjection of some private property and exclusion of other such property from the burdens of taxation. It is a dealing by the sovereign with some of its own

property in such way as to lighten to that extent the general weight of taxation. The fact that some lessees of land of the Commonwealth, or some occupants of land of the Commonwealth under different kinds of tenure, have made contracts whereby they have not been required to pay taxes upon such property, gives the plaintiff no right to complain on constitutional grounds of the clause in its lease, wherein it has covenanted to pay taxes. See *Trimble v. Seattle*, 231 U. S. 683.\* The plaintiff was free to accept or reject the terms of the lease. It acted under no compulsion or coercion in entering into its contract. We have decided this question on its merits without pausing to discuss whether the plaintiff is in a position to raise it in view of the covenants of the lease.

5. The same reasons are decisive against the contention that this section of the tax act is in contravention of the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States. Equal protection of the laws does not require that all tenants of the sovereign must hold by the same kind of tenure and be subject by contract to precisely the same liability to taxation. The variety of terms to which leases and other methods of occupancy are susceptible may secure all the equality which the fundamental law requires of a State in dealing with its property.

6. The clause in the lease touching the payment of taxes † imposes the obligation upon the lessee to pay the State and county as well as city taxes. The words "all annual taxes" are significantly broad and include all such taxes assessed each year. These words are not cut down in this respect by the sentence of definition which follows. It might have been contended that assessments for street watering, for example, if any should be laid, were comprehended within the clause first used. The explanation makes a clear demarcation between tax impositions, which are directly contributory to the support of the general purposes of government,

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\* See *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419, 428.

† The lessee "shall also pay . . . all annual taxes which may be assessed upon the premises leased, or any interest, whether of the lessor or the lessee therein, or upon any buildings, fixtures or other property put upon the said premises by the lessee. By 'annual taxes,' as applied to the leased premises, is meant the annually recurring municipal tax, and not any betterment taxes for street construction or other special taxes or assessments."

and local assessments, which are founded upon special benefits to particular estates. This is the main distinction drawn by the explanation. The use of the word "municipal" in connection with the "annually recurring . . . tax" does not restrict the meaning of the phrase to the city and exclude State and county taxes. The city tax collector is the municipal officer, acting in this respect wholly in a public capacity in behalf of the sovereign as well as the city, who gathers the tax. The word "municipal" in this context means such taxes as are collected by the officer owing his appointment to the municipality, and is thus given full force. State, county and city or town taxes commonly are combined in a single amount, although provision is made for their separation. But they are collected always by the city or town, that is, by the municipal, collector of taxes. Doubtless in other connections, when applied to taxation, the word "municipal" may be used in a restrictive sense and in contrast with State and county. But for the reasons stated, such is not its signification in the lease at bar.

In the petition against the Commonwealth, the entry may be, order sustaining the demurrer affirmed. In the action against the city of Boston, in accordance with the terms of the report, judgment is to be entered for the defendant.

*So ordered.*

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**ALEXANDER B. McKECHNIE, administrator, vs. BOSTON  
ELEVATED RAILWAY COMPANY.**

Suffolk. March 6, 1916. — May 15, 1916.

**Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.**

*Negligence*, Street railway, In use of highway. *Practice, Civil*, Conduct of trial: withdrawal by judge of erroneous instruction.

In an action under St. 1906, c. 463, Part I, § 63, by an administrator against a corporation operating a street railway for causing the death of the plaintiff's intestate by reason of a collision of a car of the defendant with a bicycle which the intestate was riding, the presiding judge in the course of his charge, alluding to the conduct of the intestate, said, "If, as he came out of P Street, from any reason — his inexperience, perhaps, — for something that we know nothing about, — if he lost temporarily the control of that machine, and if before he

gained it he found himself right in front of this car, so that he could not control it, you would be justified in finding that he was not in the exercise of due care, and it is important that he should be in the exercise of due care in order to recover." There was evidence to which this instruction was applicable. *Held*, that the instruction gave the plaintiff no ground for exception.

In the same case there was some evidence that the plaintiff's intestate in his manner of turning the corner from one street into another was violating a street traffic regulation, and the judge in instructing the jury in regard to this matter said, "Whether the boy knew the traffic regulation or not is of no consequence." *Held*, that this instruction in the connection in which it was used was not erroneous.

At the trial of the same case the judge in his charge in commenting on a statement previously made in writing by one of the plaintiff's witnesses, which had been used in the cross-examination of the witness for the purpose of contradicting him, spoke of it as if it were affirmative probative evidence, whereas the only use that properly could be made of the statement was in contradiction of the witness's testimony for the purpose of impeaching its credit. When the judge's attention was called to this matter at the close of his charge, he instructed the jury as to this and two or three other statements of a similar character, that they were "competent to be considered merely as tending to contradict, if they do contradict, what those different witnesses testified to, and go to affect the credibility" of those witnesses, and were not to be considered in any other way. *Held*, that the erroneous instruction was withdrawn by the judge and thereby cured, and therefore afforded no ground for exception.

Rugg, C. J. This is an action under St. 1906, c. 463, Part I, § 63, to recover for the death of James B. McKechnie, the plaintiff's intestate, who hereafter will be referred to as the plaintiff. The mortal injuries were received through a collision between a bicycle ridden by the plaintiff and a car of the defendant. The plaintiff came down "quite an incline" on Parker Street to its intersection with Tremont Street in Boston. The view of one coming from that direction was cut off by a wall and fence until Tremont Street was almost reached. As the plaintiff approached Tremont Street a car was coming from his right and he turned to his left and the collision occurred within a short distance with a car approaching from that direction. The jury returned a verdict for the defendant, and the case comes here on exceptions by the plaintiff to parts of the charge.\*

1. The judge said in the course of his charge, alluding to the conduct of the plaintiff, "If, as he came out of Parker Street, from any reason — his inexperience, perhaps, — for something that we know nothing about, — if he lost temporarily the control of that machine, and if before he gained it he found himself right in front

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\* Of Pratt, J.



of this car, so that he could not control it, you would be justified in finding that he was not in the exercise of due care, and it is important that he should be in the exercise of due care in order to recover." There was evidence to which this instruction was applicable and it is not open to exception. The burden was upon the plaintiff to show that he was in the exercise of due care. There is nothing in *Robinson v. Springfield Street Railway*, 211 Mass. 483, and like cases, at all at variance with the instruction given.

2. There was some evidence of violation of a street traffic regulation by the plaintiff, relative to his turning the corner from one street into the other. The instruction, "Whether the boy knew the traffic regulation or not is of no consequence," in that connection was not erroneous. *Haven v. Foster*, 9 Pick. 112, 129. *Commonwealth v. Mixer*, 207 Mass. 141. *Upton v. Tribilcock*, 91 U. S. 45, 50-51.

3. One Langille, called as a witness by the plaintiff, had testified as to the way in which the plaintiff was riding just before the collision. On cross-examination his attention was called to a statement made by him on the day of the accident, in which among other things he had said respecting the plaintiff, "When he turned the corner, he looked as though he was going to fall from the bicycle." The plaintiff's counsel in his argument to the jury said that the statement of Langille read by the defendant, "in no way contradicted his testimony; that it agreed to a dot with his testimony on the witness stand." The judge in his charge commented on this argument and upon the sentence from the statement of the witness above quoted, as if it were affirmative probative evidence. This was open to objection, for the only use which could be made of the statement was to contradict the testimony. But when the judge's attention at the close of the charge was called to the matter, he directed the jury, as to two or three statements of a similar character, to one or two of which he had referred in his charge, that they were "competent to be considered merely as tending to contradict, if they do contradict, what those different witnesses testified to, and go to affect the credibility" of those witnesses, and were not to be considered in any other way. This was enough to cure the erroneous instruction and affords no ground for exception. It was in effect a withdrawal of what had been said in that connection. *Todd v. Boston Elevated Rail-*

way, 208 Mass. 505. *Lang v. Boston Elevated Railway*, 211 Mass. 492.

*Exceptions overruled.*

*E. V. Grabill*, for the plaintiff.

*F. Ranney*, (*D. P. Ranney* with him,) for the defendant.

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WILLIAM G. WALSH vs. COMMONWEALTH.

Suffolk. March 13, 1916. — May 15, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Clams. Practice, Criminal, Sentence, Writ of error. Pleading, Criminal, Complaint. Writ of Error.*

It is erroneous, upon a complaint under R. L. c. 91, § 113, charging the defendant with having taken clams within prohibited bounds and containing no averment of a previous conviction for a like offence, to impose a sentence for more than a first offence, although in fact there may have been previous convictions which, if averred and proved, would have warranted the imposition of a greater sentence.

The averment of a previous conviction of a certain crime is an essential part of the description of the crime of having committed a second or other subsequent crime of the same nature, and such an averment must be included in the complaint or indictment for the subsequent crime in order to support a sentence for the repeated offence.

The provision of R. L. c. 193, § 12, that, if a final judgment upon a criminal complaint is reversed by reason of error in the sentence, "such judgment shall be rendered . . . as the court below should have rendered, or it may be remanded for that purpose to said court," does not deprive this court of its power, when such error is disclosed and it is apparent that the defendant has suffered enough for the crime of which he was convicted, to reverse the judgment of sentence and discharge the prisoner.

Where, upon a writ of error, it was disclosed that a sentence directing the payment of a fine of \$50 and ordering that the defendant stand committed until the fine was paid, was imposed upon a complaint for a violation of R. L. c. 91, § 113, in having taken clams within prohibited bounds, for which no fine larger than \$10 should have been imposed, and that the plaintiff in error, after being imprisoned twelve days, paid the fine, this court, being of opinion that the petitioner in error had suffered enough for the crime committed, ordered the judgment of sentence reversed, that the petitioner in error be not remanded for further sentence, and that he be awarded a judgment for costs against the Commonwealth to be paid by the county in which he was convicted.

Rugg, C. J. This is a writ of error to reverse a judgment of the Superior Court whereby the petitioner was sentenced upon a verdict of guilty on a complaint based on R. L. c. 91, § 113, charging him with having taken clams within prohibited bounds. The complaint contained no charge of a previous offence. The maximum fine permitted by § 114 for a first offence is a fine of not less than \$5 nor more than \$10. The plaintiff in error, however, was sentenced to pay a fine of \$50 and to stand committed until the fine was paid. After being imprisoned twelve days, he paid the fine. Inasmuch as the complaint contained no averment of a previous conviction for a like offence, the only sentence which lawfully could have been imposed upon his conviction was that authorized for a first offence. Plainly, therefore, the judgment was erroneous, even though in fact there may have been a previous conviction which, if averred and proved, would have warranted the sentence imposed. The averment of the previous conviction is an essential part of the description of the crime of having committed a second or other subsequent offence, which must be charged in order to support a sentence for the subsequent offence. *Tuttle v. Commonwealth*, 2 Gray, 505. *Commonwealth v. Harrington*, 130 Mass. 35. *Commonwealth v. Walker*, 163 Mass. 226.

Manifestly the plaintiff in error has suffered enough for the crime of which he was convicted. He has paid quintuple the fine which lawfully could have been imposed. Apparently the only purpose of this proceeding is to obtain the reversal of an erroneous judgment.

It is contended, however, in behalf of the Commonwealth, that the only courses open upon reversal of the judgment are that "such judgment shall be rendered in the case as the court below should have rendered, or it may be remanded for that purpose to said court." R. L. c. 193, § 12. At first sight the language of the statute seems to support this contention. Although "shall" is used, that word is not infrequently used in a permissive and not in a mandatory sense. *Cheney v. Coughlin*, 201 Mass. 204, 211, 212. That which is now § 12 of c. 193 was enacted first in St. 1851, c. 87, where the permissive word "may" was employed, and this word was continued in the subsequent revisions. Gen. Sts. c. 146, § 16, and Pub. Sts. c. 187, § 13. When the Revised Laws were compiled, two sections were combined in one and the section re-

cast. But there is no indication in the report of the commissioners or otherwise that any change of meaning was intended. It is a familiar principle that mere verbal changes in the revision of a statute, without indication that a modification of the meaning was designed, do not alter its signification. *Great Barrington v. Gibbons*, 199 Mass. 527. *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72. Before the enactment of any such statute, the only judgment possible on a writ of error in a criminal case was to reverse the judgment already entered and discharge the prisoner. *Plumbly v. Commonwealth*, 2 Met. 413, 418. *Shepherd v. Commonwealth*, 2 Met. 419. *Jacquins v. Commonwealth*, 9 Cush. 279. *Commonwealth v. Murphy*, 174 Mass. 369, 372. The statute was remedial in its nature. But it discloses no legislative purpose to curtail the power previously possessed by the court to discharge the prisoner entirely if justice should require it. It cannot be presumed that such was the intent of the Legislature.

Where the offence is trifling measured by the fine imposed by the statute, and where the prisoner already has paid all or more than all the penalty which lawfully could have been imposed, there appears no reason or justice in remanding the case to the Superior Court for further proceedings, and none has been suggested in argument. Apparently now no further judgment ought to be rendered. It is true that the plaintiff by the disposition to be made perhaps will escape without a record of conviction of a crime. See *Munkley v. Hoyt*, 179 Mass. 108. But that is not of sufficient consequence where the offence itself is purely statutory and of comparatively insignificant magnitude.

The plaintiff is entitled to his costs, to be paid by the county in which he was convicted, by the express terms of the statute. *Haynes v. Commonwealth*, 107 Mass. 194, 198.

Let the entry be

*Judgment of sentence reversed. Petitioner not remanded for further sentence, but awarded judgment for costs against the Commonwealth to be paid by the county of Norfolk.*

*C. W. Rowley*, for the plaintiff in error.

*G. E. Adams*, Assistant District Attorney, for the Commonwealth.

## COMMONWEALTH vs. SAMUEL CARVER.

Suffolk. March 21, 1916. — May 15, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; PIERCE, JJ.

*Practice, Criminal*, Exceptions, Appeal, Trial together of two indictments against same defendant. *Larceny*, By false pretences. *Evidence*, Relevancy and materiality, Competency. *Pleading, Criminal*, Indictment.

Where, after the trial of an indictment and the return of a verdict of guilty, no sentence is imposed and stayed under R. L. c. 220, § 3, and no report is made by the presiding judge under R. L. c. 219, § 34, exceptions saved by the defendant at the trial cannot be brought before this court by a bill of exceptions.

Where, at the trial of an indictment for larceny, there is evidence tending to show that the defendant represented to one, from whom he was seeking a loan of money on a promissory note, that persons whose names were on the note as maker and indorsers were of good standing, that the representations were believed and were false, that the names were written upon the note by the defendant himself and that the money was paid to the defendant and would not have been paid but for the misrepresentations, a finding is warranted that the defendant procured the money by false pretences, which is larceny within the provisions of R. L. c. 208, § 26; St. 1910, c. 378, § 2.

Where at the trial of an indictment for larceny, the Commonwealth contends and introduces evidence tending to show that the defendant procured money from the complaining witness by false representations as to the good standing of persons whose names were on a certain promissory note as maker and indorsers and by imitating their handwriting, and the question, whether the witness relied on the representations or relied only on the signature of the defendant as an indorser, was material, and after the witness in cross-examination has testified in effect that he did not make up his mind to make any loan until the defendant signed the note, the witness may be asked in redirect examination, "whether or not you would have parted with your money . . . if" the defendant "had not made the representations to you," the subject matter of the inquiry being material and the form of question being permissible within the discretion of the presiding judge.

Where, at such trial, the defendant admits that all the handwriting on the note is his own, but contends that he was authorized by the persons whose names were thereon to use their names, evidence is admissible to show that the defendant attempted to imitate the handwriting of such persons, such evidence being competent to show a guilty purpose to deceive and defraud, and therefore being relevant.

In the same case it was *held*, that one of the persons whose name was on the note was a competent witness to testify as to whether the signature purporting to be his looked like his handwriting.

Under R. L. c. 218, §§ 38, 67, an indictment charging that the defendant "did steal money" is a sufficient indictment for larceny by false pretences.

*Whether* one, who is the defendant in two indictments, one charging the forging and uttering of a promissory note and the other the larceny of money, where it appears that the money alleged to have been stolen was procured by false representations as to the good standing and signatures of persons whose names were written upon the note by the defendant, is entitled to a separate trial on each indictment, was not decided in the present case, where it appeared that the defendant consented to be tried on both indictments at one trial.

TWO INDICTMENTS, found and returned on March 6, 1915, the first charging the defendant in two counts with forging a promissory note and the second charging that he "did steal money," in amount \$925, "one piece of paper" of that value, "of the property of one Hyman Slessinger."

The defendant consented to be tried on both indictments at one trial, and was tried before *Irwin, J.*

There was evidence tending to show that Slessinger gave the defendant \$925, being induced to do so by representations of the defendant as to the good standing of the persons purporting to be the signers, other than himself, of the following promissory note:

"\$2000.00

Boston, July 21, 1914.

Three months after date I promise to pay to the order of Louis W. Reycroft Two Thousand 1/100 Dollars. Payable at any bank in Boston.

Value received.

James F. Kennedy

P. O. Box 1113, Boston.

(On back)

Waiving demand and notice

Louis W. Reycroft

Joseph P. Logue

Samuel Carver."

The defendant admitted that all the handwriting and signatures upon the note were in his handwriting.

Slessinger, in cross-examination, testified that he had seen the defendant frequently and knew he was a lawyer for eight or ten years and did not make up his mind to make any loan until the defendant signed the note. In redirect examination, subject to an exception of the defendant "to both the form and the substance," he was asked "whether or not you would have parted with your money or drawn this check to Carver if he had not

made the representations to you that Kennedy was good, that Reycroft was good, that Logue was good, and that it was a perfectly good note?" He answered "I would not."

Other material evidence is described in the opinion. At the close of the evidence, the defendant asked the judge to order a verdict of not guilty on each count of the indictments. The judge refused so to do and the jury found the defendant guilty on both indictments. The defendant alleged exceptions.

On the indictment for forging and uttering, no sentence was imposed.

On the indictment for larceny, after exceptions were alleged by the defendant, the defendant was sentenced to the House of Correction at Deer Island for one year, and, on motion of the defendant, the presiding judge ordered that execution of the sentence be stayed until further order of the court. Thereafter the defendant appealed from the sentence, and his exceptions then were allowed.

*J. C. Johnston*, for the defendant.

*D. V. McIsaac*, Assistant District Attorney, for the Commonwealth.

DE COURCY, J. The defendant consented to a single trial upon the two indictments, the first charging him with forging and uttering a promissory note, and the second with the larceny of \$925. He was found guilty on both indictments, but no sentence was imposed on the one which charged forgery and uttering. The reason for this presumably is that stated in the defendant's appeal, namely, that this case was placed on file. As questions of law arising in the trial of the forgery charge have not been reported under R. L. c. 219, § 34, and no sentence has been imposed and stayed under R. L. c. 220, § 3, the exceptions taken in that case are not properly before us. There has been merely a suspension of active proceedings in the case, and as yet no final disposition. Unless and until the prosecuting attorney shall move for sentence there is no occasion to pass upon the conduct of the forgery trial. See *Commonwealth v. Dowdican's Bail*, 115 Mass. 133; *Marks v. Wentworth*, 199 Mass. 44.

The judge rightly refused to direct a verdict of not guilty on the larceny indictment. Larceny, as defined by our statutes, includes the obtaining of personal property by criminal, false

pretences. R. L. c. 208, § 26; c. 218, § 38. St. 1910, c. 378, § 2. There was evidence for the jury that the defendant obtained the money of Slessinger by false statements as to the good standing of the alleged maker and indorsers of the note, and by his simulation of their handwriting: and Slessinger testified that he would not have parted with his money but for those misrepresentations. *Commonwealth v. Coe*, 115 Mass. 481. *Dexter v. Fuller*, 217 Mass. 219.

As to the exceptions to evidence: The question as to Slessinger's reliance upon the false representations was material in substance, and its leading form was allowable in the discretion of the presiding judge. *Comstock v. Livingston*, 210 Mass. 581. *Gray v. Kelley*, 190 Mass. 184. The testimony of Logue, that the indorsement "Joseph P. Logue" looked like his handwriting, plainly was competent on the forgery indictment. And in view of the defendant's contention that he was authorized to use the names of these parties on notes, the evidence that he sought to imitate their handwriting, which was indicative of guilt, was relevant to show intent to defraud in the larceny case. The witness could be found competent to express an opinion as to whether the signature was his own or an imitation. *Commonwealth v. Sturivant*, 117 Mass. 122, 133.

The appeal calls for little beyond what already has been said. The indictment was in accordance with the form prescribed by the statute R. L. c. 218, § 67. It charged but a single offence. *Commonwealth v. Parker*, 165 Mass. 526. Even if the defendant had a right to have the larceny and forgery cases tried separately, (see *Commonwealth v. Rosenthal*, 211 Mass. 50,) he waived that right, and preferred to have them tried together.

*Exceptions overruled. Appeal dismissed.*



## BENJAMIN F. BRIGGS vs. TREASURER AND RECEIVER GENERAL.

Suffolk. October 19, 1915. — May 16, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, &amp; CARROLL, JJ.

*Wrongful Registration of Land. Deed.*

An action of contract against the Treasurer and Receiver General under R. L. c. 128, §§ 95, 96, to recover compensation out of the assurance fund created under other sections of that statute for an alleged wrongful registration of a parcel of land belonging to the plaintiff, cannot be maintained by one whose only title to the land is derived from a deed purporting to convey the land to him, which is dated and was delivered after the decree of registration complained of and after a copy of such decree was received for transcription at the registry of deeds, the loss having been incurred, if at all, by the person who owned the land when the wrongful registration was made.

A deed of land, in which the description by metes and bounds is followed by the words "Together with all our rights in said Channel of Island End River if any," conveys the rights of the grantors in the estuary named, but does not convey a right to compensation under R. L. c. 128, § 95, for the loss of land that was a part of a dam across Island End River through a wrongful registration of such land by a decree of the Land Court.

LORING, J. This is an action of contract under R. L. c. 128, §§ 95,\* 96, to recover compensation out of the assurance fund created under other sections of that act, for the wrongful registration of a parcel of land as the land of the New England Structural Company. We do not find it necessary to consider the many important and interesting questions which were argued at the bar.

The short answer to the plaintiff's claim is that when the parcel of land in question was erroneously registered (if it was erroneously registered) the plaintiff was not the owner of it.

The decree of registration was made by the Land Court on December 14, 1906, and the copy of it was received for transcription at the registry of deeds on January 26, 1907. At that time

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\* The first part of R. L. c. 128, § 95, is as follows: "A person who, without negligence on his part, sustains loss or damage, or is deprived of land or of any estate or interest therein after the original registration of land, by the registration of another person as owner of such land or of any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in the registration book, may bring an action of contract in the Superior Court for the recovery of compensation for such loss or damage or for such land or estate or interest therein from the assurance fund."

and up to April 15, 1907, the plaintiff was a stranger to this piece of land. On April 15, 1907, he became grantee in a deed which purported to convey it to him (*inter alia*). If a right of action vested in any one it vested in the person who owned the land when the erroneous registration was made and that is not affected by a subsequent deed of the land. In this respect the case at bar stands on all fours with *Walker v. Oxford Woollen Manuf. Co.* 10 Met. 203, *Moore v. Boston*, 8 Cush. 274, *Isele v. Schwamb*, 131 Mass. 337, *Patten v. Fitz*, 138 Mass. 456.

There is nothing in the second contention made by the plaintiff, namely, that the right to be compensated for the loss of the land passed to the plaintiff by virtue of the subsequent deed.

The first argument of the plaintiff in that connection is that the description of the land conveyed including the parcel of land here in question is followed by these words: "Together with all our rights in said Channel of Island End River if any." This contention is based on the fact that the land erroneously registered as land of the New England Structural Company was part of a dam across Island End River. That clause conveyed to the plaintiff the grantors' rights in that estuary, but it did not convey to the plaintiff the right to be compensated for the loss of the land here in question.

In support of his argument on this second contention, the plaintiff relies on *Putnam v. Story*, 132 Mass. 205. In that case a homestead which should have been sold was with the consent of the remaindermen occupied by the life tenant, and one of the remaindermen in payment of a debt conveyed to a creditor his interest in that land, describing it. In that case the land ought to have been money but it was land. It could not have been held that a conveyance of the remainderman's interest in the land did not pass his right to the proceeds when the sale which ought to have taken place before did take place. That does not help the plaintiff in his contention here.

We have examined all the other authorities cited by the plaintiff and find nothing in them that requires notice.

In accordance with the terms of the report, judgment is to be entered on the verdict.

*So ordered.*

*B. F. Briggs, pro se.*

*H. W. Barnum, Assistant Attorney General, for the defendant.*

## THOMAS S. LUNT vs. CITY OF NEWBURYPORT.

Essex. October 22, 1915. — May 16, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, &amp; CARROLL, JJ.

*Eminent Domain, Validity of taking. Water Supply. Newburyport.*

The taking by the city of Newburyport under St. 1908, c. 403, for the purposes of its water supply, by an instrument in writing filed and recorded in the registry of deeds, of "The right to flow to an elevation not exceeding twenty feet above mean low water in the Merrimac River such of the lands [described] as will be flowed as a result of the maintenance of such a dam" upon the above described parcel of land gives a sufficiently accurate description of the right to flow to make the taking valid.

TORT in the nature of trespass *quare clausum fregit* against the city of Newburyport for forcibly entering the plaintiff's close in the town of West Newbury described in the declaration and causing it to be overflowed with water. Writ dated March 17, 1915.

The defendant in its answer alleged that the acts complained of by the plaintiff were done by the defendant through its board of water commissioners by right of eminent domain exercised on September 21, 1914, under authority of St. 1908, c. 403, by a taking filed and recorded in the registry of deeds; that "the plaintiff's land described in the declaration is situated by the Artichoke River or a tributary thereof between the Plummer Spring Road and the Turkey Hill Road in West Newbury, and that a portion of said land along said river or its tributary is below the elevation of twenty feet above mean low water in the Merrimac River; that the acts done by the defendant on the lands of the plaintiff, as alleged in the declaration, have been confined to those portions of said land which lie below the aforesaid elevation of twenty feet, and consist merely of flowing part of said land and removing therefrom certain trees, bushes and other matter in pursuance of the aforesaid taking and in the exercise of the rights acquired thereby, said acts having been deemed proper by the defendant's board of water commissioners and designed to carry out the purposes of the aforesaid St. 1908, c. 403."

A copy of the taking was annexed to the answer, containing with

the rest of the instrument the words of description of the right to flow which are quoted in the opinion.

The plaintiff demurred to the answer, setting forth as grounds of demurrer the following:

"1. That the answer does not state a legal defence to the plaintiff's declaration substantially in accordance with the rules contained in R. L. c. 173, and amendments thereto.

"2. That the alleged instrument of taking set forth in the defendant's answer does not contain a description of the plaintiff's lands alleged to be taken by virtue of St. 1908, c. 403, sufficiently accurate for identification."

In the Superior Court the case was heard upon the demurrer by *McLaughlin, J.*, who ordered that the demurrer be sustained, and, being of opinion that this ruling and order ought to be determined by this court before any further proceedings in the Superior Court, reported the case for such determination. It was agreed that, if the order was wrong, the demurrer was to be overruled and the case was to stand for trial; otherwise, a default was to be entered and the case was to stand for hearing on the assessment of damages unless the defendant should within thirty days from the filing of the rescript file an amended answer, leave to file such answer in that event being given.

*J. J. Gaffney*, for the plaintiff.

*R. G. Dodge*, (*H. S. Davis* with him,) for the defendant.

LORING, J. No more accurate description of a right to flow lands could be made than the one made in the case at bar, namely: "The right to flow to an elevation not exceeding twenty (20) feet above mean low water in the Merrimac River such of the lands [described] as will be flowed as a result of the maintenance of such a dam" upon the above described parcel of land.

The only doubt as to the validity of such a description comes from the question of its giving or rather not giving sufficient information to the owner of the amount of land covered by the description. It is plain that unless the owner waits until the water is turned on and reaches the elevation in question, he cannot know without the aid of a surveyor how much of his land is taken. It was said by this court in *Hinkley v. Hastings*, 2 Pick. 162, 164, that "a street ought to be laid out with certainty, so that a surveyor may be able to make a plan of it." And there is authority out-

side the Commonwealth for the proposition that a description is sufficiently certain if it can be laid out on the land by a surveyor. *Smith v. Claussen Park Drainage & Levee District*, 229 Ill. 155. *Conaway v. Ascherman*, 94 Ind. 187. But the sufficiency of the information given to the owner of the land and the validity of the description in all its aspects is concluded by the decision of this court in *Burnett v. Commonwealth*, 169 Mass. 417. In that case the description held to be valid was: "the right . . . to fill said lands to grade two hundred and fifty-one (251) above the datum known as the Boston Water Board Datum, with material excavated from other lands of said Commonwealth." The plaintiff has sought to escape from the effect of that decision by suggesting that the statement of the taking set forth in the opinion at pages 421, 422 is not a statement of the whole taking, and that the part of the taking in question in that case was helped out by the rest of the taking. But it is evident from the report of the case that that is not so, and this is confirmed by a reference to the original papers. The takings which were held invalid in *Wilson v. Lynn*, 119 Mass. 174 and in *Warren v. Spencer Water Co.* 143 Mass. 9, bear no resemblance to the taking in question in the case at bar. Under these circumstances it is not necessary to point out in detail what those descriptions were. We have examined all other cases relied upon by the plaintiff and find nothing in them which requires special notice.

By the terms of the report the order sustaining the demurrer must be reversed, an order overruling the demurrer must be entered and the case is to stand for trial. It is

*So ordered.*

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ISABEL S. SMITH vs. ALSON T. JOHNSON.

Bristol. October 25, 1915. — May 16, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

*Contract. Consideration. Execution. Release. Accord and Satisfaction.*

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for the creditor indorses and signs upon the execution an acknowledgment of the re-

ceipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's acknowledgment of satisfaction, the debtor's oral promise to do what he already was bound to do being *nudum pactum*; and the creditor in an action of contract on the judgment may recover the balance of the debt. Following *Weber v. Couch*, 134 Mass. 26.

CONTRACT on a judgment for \$800 obtained on June 3, 1904, in the Municipal Court of the City of Boston. Writ dated October 22, 1912.

In the Superior Court the case was submitted to *Dubuque, J.*, upon an agreed statement of facts. Thereby it appeared that on July 15, 1905, the sum of \$125 was paid by the defendant "in order to have the judgment discharged," and the following indorsement was made upon the execution and was signed by the plaintiff's attorney: "July 15, 1905. Received on the within named execution \$125 in full satisfaction and the same is hereby returned to Court, not having been in the hands of an officer."

It was stated in the agreed statement of facts that "In consideration thereof Johnson [the defendant] agreed to pay the balance of \$675." The defendant never paid anything except the \$125 mentioned above.

The judge ordered that judgment be entered for the plaintiff in the sum of \$675 with interest at six per cent per annum from June 3, 1904. From the judgment entered in pursuance of this order the defendant appealed.

*S. P. Hall*, for the defendant.

*E. S. White*, for the plaintiff.

LORING, J. It was held in *Weber v. Couch*, 134 Mass. 26, that an agreement (indorsed upon an execution), by which a creditor acknowledged satisfaction of the judgment in consideration of the payment of a smaller sum than the amount due thereon, was invalid.

The defendant has tried to take the case at bar out of that decision by reason of the fact that in addition to paying the smaller sum "in full satisfaction" the defendant in the case at bar "agreed to pay the balance of" the judgment. But in that contention the defendant is met with the same rule of law which was decisive of the case of *Weber v. Couch*. The parol promise to pay the balance of the judgment did not impose upon the defendant a less onerous liability than that imposed upon him by the judgment and did

not give to the plaintiff a more beneficial right than that given him by it. It follows that the defendant's parol promise to pay the balance of the judgment was neither a benefit to the plaintiff nor a detriment to the defendant and, being without consideration, was *nudum pactum*.

The defendant's other contention is that the promise to pay the balance of the judgment comes within the doctrine on which it is held that a negotiable promissory note given by a debtor is *prima facie* payment of an open account; for which he cites *Ilseley v. Jewett*, 2 Met. 168, 173, and *Wood v. Bodwell*, 12 Pick. 268. But, whether the obligation assumed by the maker of a negotiable promissory note is or is not a more burdensome one than that resting upon one liable upon an open account, the negotiable note is more beneficial than the open account and for that reason there is a valid consideration in that case. And for the matter of that a non-negotiable note which is not within the rule invoked (see *Greenwood v. Curtis*, 4 Mass. 93; *Maneely v. M'Gee*, 6 Mass. 142, 145) may be taken in satisfaction. If it is taken as an account stated it is founded on a valid consideration.

The defendant's last contention is that, inasmuch as the judgment is satisfied on the record, the plaintiff's remedy is by way of *scire facias* and for this he relies upon *Perkins v. Bangs*, 206 Mass. 408, and *Perry v. Perry*, 2 Gray, 326. But upon the face of the record the judgment was not satisfied. The indorsement upon the execution states that the plaintiff had "received on the within named execution \$125 in full satisfaction." Since the \$125 is a smaller sum than that due upon the judgment, it is apparent upon the face of the execution that the judgment was not satisfied.

The entry must be

*Judgment affirmed.*

## BERTHA T. SOULIER vs. FALL RIVER GAS WORKS COMPANY.

Bristol. October 25, 1915. — May 16, 1916.

Present: LORING, CROSBY, PIERCE, &amp; CARROLL, JJ.

*Practice, Civil.* Requests and rulings. *Negligence, Of gas company. Gas Company. Evidence.*

A presiding judge properly may refuse to make a ruling that is based on the assumption of the truth of the testimony of witnesses called by the party asking for the ruling which the jury are not bound to believe.

In an action against a gas company for personal injuries sustained by reason of negligence of the defendant's servants in turning on the gas in the house occupied by the plaintiff without first stopping up an open gas pipe that had been left when a gas stove was removed by the former tenant, the defendant asked the judge to rule that there was no evidence that any servant of the defendant turned on the meter. There was evidence that two employees of the defendant, who put in the meter, which was in the cellar, after they had done so came up stairs and tried to light the gas in the kitchen, and that, when they found that it would not light, they left the house without returning to the cellar, saying that they must send the "drip-man," and that afterwards when the drip-man had come and had pumped the drip out in the yard, the gas escaped which caused the plaintiff's injuries. *Held*, that the facts that the two employees tried to light the gas in the kitchen and left without returning to the cellar warranted a finding that they left the gas turned on.

In the same case the plaintiff testified that after the drip-man had pumped the drip out in the yard he went through a door from the yard into the cellar and then came into the kitchen where he lit the gas, that the plaintiff, who was there, said to him that she smelt "gas awful strong," to which he replied, "You smell the gas from my hands. It comes from my hands and clothes, I am full of it;" whereupon the plaintiff said, "You sure it's all right, everything is all right, you sure?" and the drip-man replied, "Everything is all right." It was admitted that it was the defendant's duty "to see everything was tight in regard to escaping gas." There was evidence that the two employees, who could have been found to have left the gas turned on, reported to the defendant that they left it turned off. *Held*, that, if the defendant's employees left the gas turned on and the defendant sent the drip-man to pump out the drip without notifying him of that fact, that could have been found by the jury to have been an act of negligence, even if the reason for not notifying him was that the two employees had reported that they left the gas turned off.

In the same case it was *held* that the jury were not bound to believe certain testimony of the drip-man, which was not contradicted, to the effect that it was no part of his duty to see that no jets were open, that he had a right to assume that the plaintiff had been using the gas "right along" and that he was sent to pump out the drip because of "poor pressure."

In the same case the plaintiff testified that, after the drip-man left, the smell of gas



got stronger and stronger, yet, after she had gone out into the yard to take a pitcher of water to her children, she went back into the pantry and there was overcome by the gas and became unconscious. She was asked on her cross-examination, why, if the gas smelled stronger and stronger, she went back into the house, and answered that she went back because she believed "what he [the drip-man] had said, that it came from his hands and clothes, and I believed the smell was still in the house." *Held*, that on the facts disclosed by the evidence the jury were warranted in finding that by the time the plaintiff went back she had been affected so far by the escaping gas that she was not in a normal condition and that therefore her act of returning to the pantry was not as matter of law a failure to exercise ordinary care.

LORING, J. On moving into a house which had been unoccupied for six months, the plaintiff sent to the defendant gas company "to put in a gas meter." This was in the week before the seventeenth of June, which in the year in question fell on a Tuesday. On some day in the middle of that week, two employees of the gas company came to the house to put up the meter. After putting up the meter, which was in the cellar, they came into the plaintiff's kitchen and tried unsuccessfully to light the gas there. They found that no gas was coming through the pipe and, without returning to the cellar, they left, saying that they would have to send the "drip-man." On Saturday of the same week another person came from the gas company, went down cellar and from there went up into the kitchen. He tried to light the gas and found it would not light and said he would have to send the drip-man and left. On the following Tuesday, the seventeenth of June, one Laroche ("the drip-man") came to the house. He pumped the "drip out" in the yard, then he went into the cellar through a door leading directly into it from the yard and then came into the kitchen. On coming into the kitchen he struck a match and lit the gas, whereupon the plaintiff said to him that she smelt "gas awful strong" to which he answered "You smell the gas from my hands. It comes from my hands and clothes, I am full of it," to which the plaintiff replied "You sure it's all right, everything is all right, you sure?" and he said "Everything is all right." At the time that Laroche came to the plaintiff's house she was getting dinner for her children who had come home early because it was "circus day." She gave the children their dinner on a plate and they took it out in the yard because of the smell of gas in the house. After taking a pitcher of water to the children in the yard the plaintiff came back into the house

to take "the pot off the stove" and put it in the pantry. She took the pot into the pantry, took some potatoes out of the pot and put them in a dish. She testified that after that: "I don't remember any more. When I next remembered I was out in the yard sitting." The true explanation of the escape of the gas was found out after the accident. After the accident it was found that the tenant who had moved out six months before the plaintiff took the house had a gas stove. On moving out the tenant unscrewed this stove from the gas pipe, laid a piece of wood over the end of the open gas pipe and left the house with the pipe unplugged. No gas came out of the unplugged pipe until the drip was pumped out because the water in the drip prevented the gas coming into the house; but when the drip was pumped out by Laroche the gas came through the drip into the house and escaped through this unplugged pipe.

There was some conflict in the evidence, but the jury were warranted in finding that these were the facts of the case.

At the conclusion of the evidence the defendant asked the presiding judge to give the five rulings \* set forth below in the note. The judge refused to give these rulings and the defendant took an exception to that refusal. The jury found for the plaintiff and the case is here on these exceptions.

1. It must be taken on this record that the case was tried on the footing that it was admittedly the duty of the defendant to turn on the gas and to see that everything was tight in regard to

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\* The judge was *White*, J. The five rulings refused by him were as follows:

"1. Upon the whole evidence the plaintiff cannot recover.

"2. Laroche, in doing what he did or saying what he said in the house of the plaintiff, was not acting as the servant of the defendant but as the agent of the plaintiff.

"3. There is no evidence that any servant of the gas company turned on the meter."

"7. If the jury find that the plaintiff was told in the house by the gas man Laroche that the smell of gas in the house came from his hands and clothes, that after the gas man had left the house and gone away, the plaintiff knew that the smell of gas was growing stronger and stronger but continued to remain in the house, and as she testified, went back into the house from out in the yard, she was not in the exercise of due care and cannot recover.

"8. If the plaintiff remained in the house, and went back into the house from the yard in the manner and under the circumstances testified to by her, she was not in the exercise of due care and cannot recover."

escaping gas. In his charge to the jury the presiding judge said: "I understand from what they (the defendant's servants) say in regard to their duty there, that it was their duty to see everything was tight in regard to escaping gas." To this no exception was taken. In fact no exception was taken to the charge. The only exception taken was that taken to the refusal to give the rulings asked for by the defendant. Under these circumstances the question which arose in *Flint v. Gloucester Gas Light Co.* 3 Allen, 343, did not arise here.

2. The defendant's first contention is that on the evidence the jury were bound to find (as the defendant asked the judge to rule in the third request) "that there was no evidence that any servant of the gas company turned on the meter."

This contention is based upon the fact that two witnesses called by the plaintiff testified that they went into the cellar immediately after the plaintiff was overcome by gas and found a spike through a hole in the arm of the meter by which the gas was turned on to the house through the meter. And the defendant's employees who put up the meter in the middle of the week, testified that they did not turn on the gas, that when they left the gas was not turned on and that there was then no spike through the arm of the meter. One difficulty with this contention is that the jury were not bound to believe the testimony of the witnesses called by the defendant. And without their testimony the proposition relied on by the defendant was not made out. As was said in *Cain v. Southern Massachusetts Telephone Co.* 219 Mass. 504, 507: "The time has long gone by when it ought to be necessary to refer to the doctrine of *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314."

But the more satisfactory answer is that if the jury believed the plaintiff's testimony they were warranted in finding that the gas was turned on by the employees who put up the meter in the middle of the week and that they left it turned on, although they reported to the defendant company that they left the gas turned off. The plaintiff testified that after the two employees had put in the meter they both came up stairs and tried to light the gas at a fixture in the kitchen and found that they could not get any light and thereupon without returning to the cellar they left the house, saying that they must send the "drip-man." The fact that these

two employees tried to light the gas in the kitchen was evidence warranting a finding that at that time the gas was on, and since they left without returning to the cellar there was evidence that they left it on.

3. The next contention of the defendant is that the company is not bound by Laroche's statement (testified to by the plaintiff) that "Everything is all right." This is based upon the fact that Laroche testified that it was no part of his duty to see that no jets were open; that he had a right to assume (1) that the plaintiff had been using gas "right along" and (2) that he was sent to pump out the drip because of "poor pressure." This is based upon the assumption that because the evidence was not contradicted the jury were bound to believe it. But that is not so.

It was admitted that it was the defendant's duty "to see everything was tight in regard to escaping gas." If the defendant's employees left the gas turned on and the defendant sent Laroche to pump out the drip without notifying him of that fact, that was, or could have been found by the jury to have been, an act of negligence even if the reason for not so notifying Laroche was that the first employees who left the gas on reported that they left it off.

Under these circumstances it is not necessary to consider the effect of the testimony of the assistant manager of the gas company. He testified in answer to the question "If your drip-man should go into a house after pumping a drip, and find a strong odor of gas there, and the woman of the house complains of the strong odor of gas, would there be any duty then, on the part of your drip-man to investigate what caused that flow of gas?" that "If the drip-man knew that was a strong odor of gas and not the odor of drip water, he should investigate."

4. The defendant's last contention is that the plaintiff was as matter of law guilty of contributory negligence because she testified that the smell of gas got stronger and stronger after Laroche left and yet she went back into the pantry after she had taken the pitcher of water to the children. She was asked why, if the gas smelled stronger and stronger, she went back into the house, and she answered that she went back into the house "Because I believed what he [Laroche] had said that it came from his hands and clothes, and I believed the smell was still in the house." But

the jury were warranted in finding that by that time she had been so far affected by the escaping gas that she was not in a normal condition and for that reason her act of returning to the pantry was not as matter of law a want of ordinary care.

We have examined all the cases cited by the defendant and find nothing in them which requires special notice.

*Exceptions overruled.*

*A. J. Jennings, (I. Brayton with him,) for the defendant.*

*J. A. Kerns, for the plaintiff, was not called upon.*



CHARLES W. RALPH & another vs. OREN W. CLIFFORD & another.

Bristol. October 25, 1915. — February 9, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

*Way, Private. Deed, Construction.*

Where in a deed of a lot of land the only reference to an alleged private street is that a boundary of the lot is described as beginning on a certain avenue at the corner of a street, when in fact there is no street and no indication of a street, and the only indication that a street ever was contemplated is the fact that two posts were placed by the grantor on the line of the avenue about forty feet apart, which posts remained there only a short time, there is nothing to estop one, who owns the adjoining land under a subsequent deed from the same grantor and who purchased it after the posts had disappeared, from denying the existence of an alleged private street forty feet wide over his land.

Where it appears that, at the time the landowner claiming such a right of way purchased his land, the grantor showed to him and to at least one other person a plan or blue print on which a street forty feet wide was marked or traced upon the adjoining land in accordance with the claim of the right of way, but there is no evidence of such a plan, this cannot affect the rights of the owner of the adjoining land, who had no notice of this incident when he purchased his land and who can be charged with notice only of what was disclosed by the records in the registry of deeds or of what appeared upon the surface of the earth.

BILL IN EQUITY, filed in the Superior Court on September 12, 1904, by part owners of a lot of land on Richards Avenue in North Attleborough who sought, as the successors in title of Ellen Miller, to whom the land was conveyed by Henry L. Kendall on May 30, 1881, to restrain the defendants from obstructing by the erection

of a building or otherwise an alleged private street or way forty feet wide running from Richards Avenue to Church Street.

The case was referred to a master who filed a report in which were found the facts that are stated in the opinion.

No exceptions to the master's report appear to have been filed and the case was heard upon that report by *White, J.*

The judge having said that he wished to hear evidence as to what would be a reasonable width of a way for vehicles and travellers, all the parties agreed that ten feet would be such a width, the plaintiffs not waiving their claim to ownership in the way or to a right by prescription.

The judge made a final decree enjoining the defendants from interfering with or obstructing the plaintiffs' right of way in a strip of land ten feet wide, running northerly from Richards Avenue along the west boundary of the plaintiffs' land to a point eighty feet distant from that avenue, and ordering the defendants to pay to the plaintiffs the costs of suit taxed at \$95.28.

The plaintiffs appealed from the decree.

*C. R. Cummings*, for the plaintiffs.

*F. B. Fox*, for the defendants.

CROSBY, J. This is a bill in equity brought to restrain the defendants from obstructing an alleged private street. The land now owned by the plaintiffs and by the defendants, respectively, formerly was included in a larger tract owned by one Kendall, and was bounded on the south by a way known as Richards Avenue in North Attleborough. On May 30, 1881, Kendall, by deed, sold and conveyed to Ellen Miller a lot of land bounded fifty feet by Richards Avenue and one hundred and forty feet deep. The plaintiffs are the successors in title to an interest in this lot.

The defendant Annie M. Clifford is the owner of a parcel of land adjoining the plaintiffs' lot on the west, and obtained title thereto by deed from one Lewis dated October 1, 1901. The plaintiffs claim a right of way over a strip of land forty feet wide owned by the defendants along the westerly side of the lot owned by them and extending from Richards Avenue northerly to Church Street.

The case was referred to a master who has found that "at the time Kendall sold to Ellen Miller he had, and showed to her, or her agent, and to at least one other person, a plan or blue print

which was marked or traced with a forty foot street running northerly from Richards Avenue, where the locus in dispute is situated. In this deed to her he described the premises as 'beginning at the corner of a street.' That is the only reference in the deed to a street. There is no evidence of any plan now existing showing any street line northerly from Richards Avenue by these premises." The master also has found that there was no fence on the street line between the strip in dispute and Richards Avenue, and from the appearance of the surface of the ground no indication of a street; that there was no driveway over the disputed strip from Richards Avenue to Church Street; that there are no boundaries, stakes or marks indicating a street, and there never have been any such boundaries "excepting the placing of two posts about forty feet apart in the northerly line of Richards Avenue by Kendall before the sale to Miller, which posts remained there a short time only;" that no such posts were there when the trustees under the will of Kendall conveyed the premises now owned by the defendant Annie M. Clifford; and there is nothing to indicate a street or way, and no evidence of any use of the Clifford premises northerly of a gate in the fence in the westerly line of the plaintiffs' lot, the southerly end of which gate is eighty feet northerly of Richards Avenue.

When a grantor conveys land bounded on a street or way he and those claiming under him are estopped to deny the existence of such street or way, and the right of way of the grantee and his successors in title therein includes the entire length of the way as then actually laid out or clearly defined.

This is the contention of the plaintiffs and it is fully sustained by the authorities, and applies as well to a contemplated way if clearly indicated as to an existing street. *Parker v. Smith*, 17 Mass. 413. *Tufts v. Charlestown*, 2 Gray, 271. *Stetson v. Dow*, 16 Gray, 372. *Tobey v. Taunton*, 119 Mass. 404. *Foley v. McCarthy*, 157 Mass. 474. *Sprague v. Kimball*, 213 Mass. 380.

Although the master finds "that at the time Kendall sold to Ellen Miller he had, and showed to her, or her agent, and to at least one other person, a plan or blue print which was marked or traced with a forty foot street running northerly from Richards Avenue, where the locus in dispute is situated," still this finding cannot affect the rights of the defendants. The defendant

Annie M. Clifford is charged with notice of what was disclosed by the record, and is also charged with what appeared upon the surface of the earth. There is no evidence to show that she had any knowledge of the plan, above referred to, which did not appear of record. The only reference upon the record to a street is in the description in the deed from Kendall to Miller, which begins "Bounded: Beginning on said Avenue at a corner of a street" — so that the only fact, therefore, of which the defendant Annie M. Clifford was charged with notice on the record, was that the corner of the Miller lot, now owned by Ralph, began "at a corner of a street." She was not charged on the record with notice that it was adjacent to the land of the plaintiffs on its westerly side, when that defendant took title to her land, nor was there anything on the surface of the earth to indicate a street. The only thing that could be seen was a narrow path which is established by prescription, leading from Richards Avenue northerly eighty feet along the westerly boundary of the plaintiffs' lot. This evidence falls short of charging that defendant with notice of a street, and is distinguishable from the cases above cited and others decided by this court, in which it has been held that a grantor and his successors were estopped to deny the existence of a way.

The case of *Decatur v. Walker*, 137 Mass. 141, cited in the plaintiffs' brief, is not at variance with the conclusion reached in the case at bar. In that case the court said "On March 31, 1873, Decatur mortgaged the alleged dominant estate to Lydia, describing one boundary line as running 'to a passageway to be made.' There was some evidence that the passageway thus referred to was identified, and that it ran over the grantor's land in the course adopted by the defendant at the time of his alleged trespass. If the way was identified by mutual agreement at the time, or even after the conveyance, it stood on the same footing as if it had been described in the deed."

From an examination of the original record in that case, it appears that at the time of the conveyance there was evidence to show that stakes were set and that the passageway "looked as if ploughed in the middle, and had a gutter each side next to the stakes." There was also evidence that the passageway extended from the front of the lot conveyed to the railroad, and at that time had been partially constructed, and that the Walker lot was not



adjacent to any public way and had substantially no other way of ingress and egress, and that the plaintiff in fact knew of the defendant's claim to the way before her purchase from the one who had been common owner of both lots.

The statement of the court in *Decatur v. Walker* must be taken in connection with the facts of that case and not to lay down a general proposition which would include a case like the one at bar where no way was described directly or indirectly in the deed and where no way existed upon the surface of the land.

The evidence of the location of the way is too uncertain and indefinite for this court to say that the finding of the master was clearly wrong. He has found that the plaintiffs and their predecessors in title have obtained by prescription a right of way over the defendants' land from Richards Avenue extending northerly along the westerly line of the plaintiffs' lot for a distance of eighty feet, and the parties have agreed that ten feet is a reasonable width of such a way for vehicles and travellers. It follows that the entry must be

*Decree affirmed.*

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HENRY C. HALL, administrator, *vs.* WILLIAM A. PAINE & others.

Suffolk. November 8, 1915. — April 11, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

*Stockbroker*, Liability to customer. *Damages*, In contract. *Stock Exchange*, Rules of. *Agency*, Scope of authority. *Election*. *Contract*, Rescission, Ratification.

In an action of contract against a stockbroker by one of his customers there was evidence that the defendant had purchased for the plaintiff a large number of shares of a certain stock which was dealt in actively on the stock exchange and was bought and sold daily, that the defendant agreed to carry these shares for the plaintiff on margin and to deliver them to him on demand regardless of the state of the market, that against the plaintiff's objection and protest the defendant from time to time sold these shares until all of them were sold, sending to the plaintiff immediately after each sale notice of the sale and an account of it, that after the final sale the defendant sent to the plaintiff a check for the balance shown by the account to be due, which the plaintiff kept, and that the plaintiff thereafter demanded the return of all the shares of stock and brought his action for damages. *Held*, that the plaintiff could recover only nominal damages, as he might have purchased the shares at substantially the prices at

which they were sold by buying them back on receiving notice of each sale; and that the rule as to computing damages by the highest intermediate value of the shares is not applied to such a case in this Commonwealth.

Where a stockbroker holds shares of stock belonging to a customer with a general authority, either express or implied, to sell them, he has no authority to sell them to himself without the knowledge and assent of his customer, and, if he does so, the sale is voidable by the customer, although it may have been at auction and the full market price has been paid so that no harm has resulted.

Although one who employs a stockbroker to buy or sell shares of stock for him on a stock exchange is bound by the established usages of that stock exchange so far as they are not illegal or contrary to sound public policy, whether he knows of them or not, he is not bound by a usage of the stock exchange which permits a broker to buy for himself without the knowledge of his customer shares of stock which such customer has entrusted to him for sale.

One who employs a broker to sell for him shares of stock on a stock exchange is bound by a usage of the stock exchange, which also is embodied in an express rule, permitting brokers to purchase shares of stock from their customers when acting, not for themselves personally, but as brokers for other customers; and, where such sales were made at market prices and there is nothing to indicate that the selling customer was not dealt with fairly, he cannot avoid the sale by showing that he did not know of the usage or rule.

One, who has the right to avoid a sale of shares of stock made for him by a broker to the broker himself personally under a usage of the stock exchange unknown to the customer, must exercise his right of avoidance within a reasonable time after he learns of the facts or after he might learn of the facts by inquiry under circumstances that would put a man of ordinary intelligence upon inquiry.

In the present case, where the plaintiff had received and retained the defendant's check for the balance of his account as stated by the defendant, it was *held*, that it could not be ruled as matter of law that the plaintiff had affirmed the sales which he sought to avoid.

In an action against a stockbroker by a customer, where the plaintiff has established the fact that he exercised his right of avoidance of such sales of shares of stock within a reasonable time, the plaintiff, if he shows that the defendant made certain sales of the plaintiff's stocks to himself personally, can recover the difference between the value of the stocks when sold and their value when the sales were made known to and were repudiated by him, with interest from that date.

RUGG, C. J. The plaintiff's intestate was a customer of the defendants, a firm of stockbrokers, who were carrying for him certain stocks on margin. He seeks to recover from them damages alleged to have been sustained arising out of these transactions. For convenience, the plaintiff's intestate hereafter will be referred to as the plaintiff.

1. One ground of action is the breach of an oral contract, whereby the defendants agreed to carry for him shares of Copper Range Consolidated Mining Company stock as long as he desired, regardless of the state of his margin account and of the market,

and to deliver them to him on demand. Whether the contract was made, as alleged by the plaintiff, was one of the issues at the trial. There was evidence tending to show that the plaintiff at one time had fourteen hundred and fifteen shares of the Copper Range Consolidated Mining Company stock in the hands of the defendants which they were carrying for him on margin; and that from time to time the defendants sold all these shares, sending him forthwith after each sale notice and an account; and that after the final sale a check was sent him for the balance shown to be due, which the plaintiff kept. The plaintiff seasonably protested against the making of these sales and finally demanded the return of the stock, which the defendants refused. Copper Range Consolidated appears from the evidence to have been a stock in which there was active trading on the stock exchange and which, therefore, could readily have been bought in the market day by day.

At the close of the evidence the judge instructed the jury that if they should find the contract to have been made between the plaintiff and defendants as contended by the former, his damages for breach of the contract by sales of the stock would be nominal. In view of that ruling, the plaintiff did not care to go to the jury upon the question whether the contract was made.\*

The case calls for a statement of the rule of damages to be applied when there is a breach of contract to carry stocks. It is contended by the plaintiff that the governing rule of damages is that known as the highest intermediate value rule, whereby he is entitled to recover on the basis of the highest prices which could have been realized for the stock between the times when the several blocks of stock were sold and the time of trial.

The common rule of damages for the breach of a contract is the actual loss at the time of the breach. *Barrie v. Quinby*, 206 Mass.

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\* The case was tried before *Brown*, J. His other rulings are described in the opinion. The judge ruled that the plaintiff is entitled to damages, might "recover on the basis of the highest prices which could have been realized for such stocks between the time when the transactions referred to took place and the time when the plaintiff had notice or knowledge of the way in which these shares had been dealt with." The parties computed the damages under this rule and agreed upon the amount of \$116,068.20. By direction of the judge the jury returned a verdict for the plaintiff in this sum, and the judge thereupon reported the case for determination by this court.

259, 267, 268, and cases there collected. *Cumberland Glass Manuf. Co. v. Wheaton*, 208 Mass. 425, 434. *Moffat v. Davitt*, 200 Mass. 452. *Tufts v. Bennett*, 163 Mass. 398. *Williams Brothers v. Ed. T. Agius, Ltd.* [1914] A. C. 510, 520, 523, 530. The foundation for this rule as applied to contracts for sales or purchases is that goods such as are ordinary subjects of commercial transactions have a fixed value in the market, so that they can be replaced or disposed of at any time. Adequate compensation for the breach of any duty touching the purchase, sale, delivery or carrying of such property is measured by its fair market value at the time of the breach. This is a principle which in its broader aspects has illustrations in many departments of the law. It is the usual rule for the determination of damages arising from the conversion of property. The owner is entitled to recover the fair market value of the property at the time of conversion. Fair market value is the established standard by which to gauge the damages for the taking of property under the power of eminent domain. The measure of damage for deceit or breach of warranty in the sale of goods is the difference between the market value of the thing sold and of that bargained for. The fundamental principle upon which all these rules rest is that, by resort to the test of market value, fair and complete compensation is afforded for the deprivation of the property to which otherwise the injured party would be entitled. Indemnity for such damage is afforded by payment of market value. The theory of the law is that the injured party shall be placed in the same position he would have been in if the duty owed to him had not been violated, so far as compensation can be ascertained by rational methods resting upon a basis of facts. But he is not to be made richer.

It is a general principle of law, because it is a rule of fair dealing, that when one is deprived of the fruits of a contract, he must use the efforts of a reasonably prudent man to put himself in as good a position as he would have been in if the contract had not been abrogated. He cannot lie idly by and expect to recover all losses which such inaction may entail as damages for breach of the contract. He must be reasonably active and diligent to recoup his loss. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 6. *Jamal v. Moolla Dawood Sons & Co.* [1916] A. C. 175, 179. The same rule obtains in actions of tort. *Gray v. Boston Elevated Rail-*

way, 215 Mass. 143, 147. *Texas & Pacific Railway v. Hill*, 237 U. S. 208, 215. The plaintiff could have purchased shares of stock to replace those sold by the defendants within a reasonable time after such sales at substantially the same prices as those for which the sales were made. That principle applied to the case at bar would enable the plaintiff to recover only nominal damages.

The common rule as to the assessment of damages has been applied frequently in this Commonwealth in actions for breach of contract for sale, and for delivery, and for conversion of stock. The early case of *Gray v. Portland Bank*, 3 Mass. 364, was an action for the refusal to let the plaintiff subscribe for and take shares of stock in a corporation according to the terms of his contract. In discussing the rule of damages, reference there was made (pages 390, 391) to the English rule of highest intermediate value, but it was held that the same rule applied to stocks as to other kinds of personal property, and that the time when the stock should have been delivered was the time as of which its value should be ascertained for purposes of determining the damages, and not the time of trial or any intervening time. In *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 100, the same principle was followed. The rule of intermediate highest value up to the time of trial, recognized as prevailing in New York at that time, was repudiated. The court there followed, in determining the rule of damages to be applied in stock transactions, the rule applicable to the conversion of goods, namely, their value at the time of conversion. To the same effect are *Hussey v. Manufacturers & Mechanics' Bank*, 10 Pick. 415, 422; *Wyman v. American Powder Co.* 8 Cush. 168, 182; *Fay v. Gray*, 124 Mass. 500; and *Greenfield Savings Bank v. Simons*, 133 Mass. 415. All these are cases relating to damages for detention of stock, where the rule is followed without discussion. See, also, *Greenfield Bank v. Leavitt*, 17 Pick. 1, and *Stewart v. Joyce*, 205 Mass. 371. A case very like that at bar was *Parsons v. Martin*, 11 Gray, 111, where a broker, having been entrusted with stock for a definite purpose, used it for another purpose, and where at page 116 it was said: "And having thus violated his duty, by making a disposition of the stock which was unauthorized and unjustifiable, he became immediately responsible for the value of the property with which he had been entrusted. It was in effect a conversion of it to his own use; and

the well established rule in reference to compensation to be made or damages recovered in such cases is the market value of the property at the time of its conversion." This rule was discussed by Chief Justice Shaw with his customary thoroughness and conclusiveness of result in *Parks v. Boston*, 15 Pick. 198, 206, 207. He there treats actions as to stocks as standing on no other or different basis than any other commodity in respect of damages for breaches of contract as to delivery or sale or for conversion. He adverts to the specious plausibility of a rule which stops the mouth of a wrongdoer to deny that "the plaintiff, if he had had his stock, might not have kept it for the highest price to which it has at any time risen," especially since the defendant by keeping the stock or money, perhaps practically has deprived the plaintiff of the opportunity of buying "an equal quantity at the market price of the day." The fallacy of this argument there is demonstrated by reference to the rule that damages for the detention of money universally are held to be measured by interest. His conclusion in favor of the rule of market value and against that of highest intermediate value, is stated in these words at pages 207, 208: "But the other rule has found favor, not because it will, in all cases, do justice; for no general rule will do this; but because it is more equal, it is certain and simple and practical, and will do justice in the greatest number of cases. The rule contended for is not equal, because, if the goods or stock have fallen, between the time of the non-delivery and the time of the trial, the defendant is not to have the benefit of it. This, no doubt, results from the consideration, that the defendant is a wrongdoer, and it is just to throw the risk upon him. But it is manifest, that this would throw a strong temptation in the way of a plaintiff to delay bringing his action, as long as the rule of limitations will admit, in order to avail himself of the probable fluctuations in the market. To guard against this, some judges have laid down the rule with this modification, namely, that the action is brought without delay, (*Clark v. Pinney*, 7 Cowen, 681, 696,) or confined plaintiffs to one of two periods, as the day of the breach, or the day of the trial. But the advantage of the other rule is, that it is certain and practical, and tends to prevent litigation, being a rule which parties may apply for themselves, and which, in most cases, will be the nearest approximation to doing particular justice. These are

advantages, which those conversant with legal proceedings, know how to appreciate." These words were used in deciding a petition for the assessment of damages for a taking by eminent domain, where the argument of highest intermediate value had been put forward, and where logically it was as applicable as in the case at bar. The plaintiff in each case is entitled to compensation or indemnity for loss sustained and to nothing more. Vindictive or punitive damages are not a part of our law. See *Ellis v. Brockton Publishing Co.* 198 Mass. 538, 543. There is nothing inconsistent with this result in *Maynard v. Pease*, 99 Mass. 555. There specific instructions to a factor not to sell merchandise below a fixed price were violated. The evidence was not reported, and the ruling as to damages was sustained by reference to the possibility that the sale may have been at a time when the market was depressed and a favorable price could not be obtained. Confessedly the opinion does not undertake to lay down the correct rule of damages. *Dalby v. Stearns*, 132 Mass. 230, is not at variance but rather in harmony with the general rule. *Fowle v. Ward*, 113 Mass. 548, is distinguishable for the reasons set out in *Stewart v. Joyce*, 205 Mass. 371, 375. This review of our cases demonstrates that for more than a century the rule of damages applied to breaches of contracts respecting stocks and in actions for conversion of stock has been the same as that applied to similar facts touching other classes of property.

There appears to us to be no sound reason apart from authority why any different rule of damages should be invoked as to stocks from that which governs transactions respecting other property.

In general when exceptional circumstances appear which demonstrate that the rule of fair market value would not afford compensation, then the usual principle becomes no longer applicable and inquiry is made as to the real damage sustained by the breach of duty or other injury. See *Stickney v. Allen*, 10 Gray, 352; *Green v. Boston & Lowell Railroad*, 128 Mass. 221; *Smith v. Commonwealth*, 210 Mass. 259, 261 and cases cited; *Weston v. Boston & Maine Railroad*, 190 Mass. 298; *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A. C. 394. The same is true where the evidence established no market value. *Whitney v. Lynch*, 222 Mass. 112. There is nothing extraordinary or peculiar in the nature of corporate stocks which renders contracts touching them

subject to any different rules than those which govern the sales of other property. Indeed, there is scarcely any commodity whose value is more intimately dependent upon the state of the market. When they are bought and sold regularly on the stock exchange, a market value is constantly established, by resort to which their precise value at any time may be ascertained with accuracy. It may happen that the rule of value at the time the right of action accrues in sales of stock made in violation of duty during a period of panic or unusual depression, or of stock subject to great fluctuations of market value, would not afford compensation. Where special or exceptional circumstances are made to appear, resort may be necessary to a more fundamental rule in order to do justice. That rule is, that a party injured by the breach of a contract is entitled to be compensated for the loss sustained as the natural and probable consequences flowing from the failure of the other party to perform the contract by the other party, or which reasonably may be presumed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of it. *Leavitt v. Fiberloid Co.* 196 Mass. 440, 446. *Boyden v. Hill*, 198 Mass. 477, 486. *John Hetherington & Sons, Ltd. v. William Firth Co.* 210 Mass. 8, 21. It is on this principle that damages are awarded in appropriate cases for the loss of prospective profits of a business. *Neal v. Jefferson*, 212 Mass. 517. *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 35. If a broker has acted unfairly in selling stocks at a manifestly unfavorable time or for an unfavorable price, and the customer has not notice within such time and under such circumstances of access to the market that he could, if so disposed and acting with reasonable promptness having due regard to all factors of the situation, place himself in a situation similar to that in which he would have been but for the broker's breach of duty, then special circumstances might be shown which would entitle the customer to prove his special damage. Such special damage could not ordinarily exceed the price at which such stock could be bought within a reasonable time after the accrual of the right of action came to the knowledge of the injured party. Such special circumstances were shown, for example, in *Galigher v. Jones*, 129 U. S. 193, although the rule here stated was not in terms there followed. The rule of highest intermediate value is one which places all the



risk of damages, in case of a stock rapidly advancing in value, upon a defendant and gives him no chance of advantage from its decline. In instances of fluctuating stock that rule rests upon the almost unthinkable basis that a customer trading upon margins would maintain sufficient margins at all times and would sell at the exact moment of highest value. Such a fortuitous chance scarcely ever could be realized in actual experience. It seems to us to afford no just foundation for a rule of law, which ought to be based upon common custom and work out justice to parties in the great majority of cases to which it is likely to be applied.

For these reasons, both on the authority of our own cases and in reason, we decline to follow the rule of highest intermediate value which has been urged in argument.

That rule appears to prevail in England although it does not seem to have been expressly so decided. See *Michael v. Hart & Co.* [1901] 2 K. B. 867; *S. C.* [1902] 1 K. B. 482; *Ellis v. Pond*, [1898] 1 Q. B. 426. Although it once was adopted in New York, *Markham v. Jaudon*, 41 N. Y. 235, it soon was overruled in the able opinion in *Baker v. Drake*, 53 N. Y. 211; *S. C.* 66 N. Y. 518, where the present New York rule was established, that damages should be measured by the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which time he could go into the market and repurchase it. This rule has been elaborated in other cases. *Mullen v. Quinlan & Co.* 195 N. Y. 109, 115. *Colt v. Owens*, 90 N. Y. 368. *Brewster v. Van Liew*, 119 Ill. 554. *In re Swift*, 50 C. C. A. 264. For the reasons already stated, the New York rule does not prevail in this Commonwealth. Perhaps in its practical operation as applied to some cases, the rule here stated, resting on the authority of our cases as a logical and symmetrical development of the general rule of damages, does not differ materially from the New York rule. Indeed, the statement of the New York rule in *Wright v. Bank of Metropolis*, 110 N. Y. 237, is not greatly unlike that here given.

The conclusion now reached is a rational application of general principles by which damages have been measured during many years in a vast variety of causes. Its application to the present facts tends toward a symmetrical system of law. It works justice in most cases. It is simple and certain. It finds support in

other jurisdictions. *Pinkerton v. Manchester & Lawrence Railroad*, 42 N. H. 424. *Frothingham v. Morse*, 45 N. H. 545. *Pennsylvania Co. for Ins. on Lives v. Philadelphia, Germantown & Norristown Railroad*, 153 Penn. St. 160. *McKenney v. Haines*, 63 Maine, 74. See 2 Sedg. Damages, (9th ed.) § 523. It is consonant with general principles and avoids the setting up of a special rule applicable only to a particular kind of property. As was said by Cooley, J., in *Chadwick v. Butler*, 28 Mich. 349, 353, it affords damages which "would have enabled the party to purchase other property of the like kind and of equal value at the same place."

No exceptional circumstances are disclosed in this case which require the application of any other than the ordinary rule. The sales were made at the prevailing market prices. They were not made on occasions of extraordinary and temporary depressions of value or in panic periods. They were not timed to work oppression to the plaintiff. Immediate notice was given to him in every instance, so that he was kept constantly advised of the situation. Ample opportunity was afforded him to repossess himself of a like amount of stock sold at the same price if he had so desired and had exercised ordinary diligence to that end. It is plain, therefore, that the ruling was right, to the effect that nominal damages alone could be recovered for breach of the general contract to carry these stocks. The plaintiff's reliance in this connection on *P. P. Emory Manuf. Co. v. Salomon*, 178 Mass. 582, cannot be supported. That case has no application to these facts. All his counts upon this branch of the case stand on the same footing and are governed by what has been said.

2. The second ground of action set forth by the plaintiff, relates to sales of stock made by the defendants as brokers, under a general express or implied authority from the plaintiff to sell. It is founded upon the allegation in substance that the defendants reported to him from time to time that they had sold for him certain stocks, whereas in truth these stocks were not actually sold, but were either fictitiously transferred to or bought by the defendants personally or as agents for their other customers, without special authorization to that end and in violation of their duty to him; that these stocks are still the property of the plaintiff, and that this was a breach of their obligation to him and a

deception for which he is entitled to damages. This alleged ground of action related not to authority to sell but to the exercise of the authority.

There was evidence tending to show that certain sales of stocks (a general express or implied authority to sell which had been given by the plaintiff to the defendants) reported to the plaintiff as made for him by the defendants were purchases directly by themselves as brokers for other customers, according to the rule and practice of the stock exchange; and that in other instances they had purchased or taken over certain of these stocks for themselves on their own account at the market price. This method of doing business was not reported to the plaintiff by the defendants and he did not know of it or of the rule or custom of the stock exchange respecting the subject until the hearing before the auditor; but the plaintiff knew that there were rules of the stock exchange and he contracted with reference to them. On this state of the evidence upon this branch of the case, the judge ruled that "the defendants, without the plaintiff's knowledge or assent, had no right to purchase the plaintiff's stock which they were employed as brokers to sell, and that they had no right while acting as the plaintiff's brokers to sell his stock . . . also to act as brokers for the purchasers of the stocks." Accordingly, he ruled that the plaintiff's "title to such stocks as were thus dealt with is not affected by the transactions whereby the defendants acquired his stocks either for themselves or their customers, and that they continued bound to deliver or account for them upon the payment or offer of the amount due the defendants." This branch of the case falls into two divisions.

A. The first part of this ruling means in its essence that, in the absence of assent by the plaintiff, the defendants had no right to buy the stocks directly themselves even though this was permitted by the custom of the stock exchange, and that any custom of the stock exchange permitting such direct purchases was invalid. Although the rule in this Commonwealth is that, in the ordinary relation between customer and broker where the latter carries stocks on margin, the legal title is in the broker, *Chase v. Boston*, 180 Mass. 458, differing in this respect from that of some other jurisdictions, *Gorman v. Littlefield*, 229 U. S. 19, yet the broker owes the same duty to the customer in the purchase and

sale of stocks, "that he owes to him, where he is employed to buy stocks, which are to be taken and paid for by the customer in place of being taken and paid for by the broker for the customer." *Rice v. Winslow*, 180 Mass. 500, 502. For breach of that duty by the broker a cause of action arises and, so far as the measure of damages goes, it is not of consequence whether the action is in tort for conversion or for breach of contract. *Richardson v. Shaw*, 209 U. S. 365, 382. Moreover, in this respect it matters not whether the stocks were bought on margin or deposited with the broker. *Furber v. Dane*, 203 Mass. 108, 115.

It is a general principle that an agent clothed with naked power to sell, while he may transfer a good title to a third person, cannot purchase for himself, at least not without the full knowledge and assent of his principal. A broker's obligation to his principal requires him to secure the highest price obtainable, while his self-interest prompts him to buy at the lowest practicable price. The law does not trust human nature to be exposed to the temptations likely to arise out of such antagonistic duty and influence. This rule applies even though the sale may be at auction and in fact free from any actual attempts to overreach or secure personal advantage, and where the full market price has been paid and no harm has resulted. The converse of the rule is equally binding, that an agent to buy cannot sell his own goods to his principal without the latter's knowledge and assent. *Middlesex Bank v. Minot*, 4 Met. 325. *Lord v. Hartford*, 175 Mass. 320. *Quinn v. Burton*, 195 Mass. 277, 279. *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197, 202. *Hayes v. Hall*, 188 Mass. 510, 514. *Rothschild v. Brookman*, 5 Bligh, 165. *C. S. Wilson & Co. v. Finlay*, [1913] 1 Ch. 565, 568, 570.

This rule is so deeply grounded in fundamental reason that no custom or private rule can override it. Doubtless, when one employs another to trade for him in a particular market, he impliedly authorizes the dealings to be conducted according to the established usages of that particular market, whether he knows of them or not. *Cronin v. Hornblower*, 211 Mass. 538. *Furber v. Dane*, 203 Mass. 108, 116, and cases cited. *Bibb v. Allen*, 149 U. S. 481, 489. Yet, he becomes bound only by such usages as are not illegal or contrary to sound public policy and "are such as regulate the mode of performing the contracts, and do not change their

intrinsic character." The present custom permitting one employed as a broker to become the purchaser without notice "is of such a peculiar character, and is so completely at variance with the relation between the parties, converting a broker employed to buy" or to sell "into a principal selling" or buying "for himself, and thereby giving him an interest wholly opposed to his duty, that . . . no person who is ignorant of such an usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker, to whom the usage is known, to perform the ordinary and accustomed duties belonging to such employment." *Robinson v. Mollett*, L. R. 7 H. L. 802, 836, 838. *Irwin v. Williar*, 110 U. S. 499. *Tetley v. Shand*, 25 L. T. (N. S.) 658, 661. *Hamilton v. Young*, 7 L. R. (Ir.) 289. So far as the defendants bought stocks for themselves which as brokers they were selling for the plaintiff, these sales were at least voidable and may be treated as such by the plaintiff.

B. But so far as the transactions involve sales by the defendants, as brokers for the plaintiff, to themselves acting as brokers for other customers and not for themselves personally, different considerations prevail. There was evidence tending to show, not only the custom of the stock exchange permitting such sales and purchases, but an express rule of the stock exchange authorizing them and governing their conduct.\* The auditor found that there was no direct evidence that the plaintiff knew of the article in the rules of the stock exchange, "but he did know that there were rules of the exchange and he contracted with reference to them." The point to be decided is not strictly whether an agent can act at the same time for both parties to the same transaction. That cannot be done ordinarily without general assent. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 375, 376. *Dzuris v. Pierce*, 216 Mass. 132, 135, 136. *Quinn v. Burton*, 195 Mass. 277. *Little v. Phipps*, 208 Mass. 331, 333. *Ebert v. Haskell*, 217 Mass. 209. Nothing hereafter said impairs that rule in the slightest degree. The precise point is, whether a rule of the stock exchange together

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\* The rule referred to was as follows: "Where parties have orders to buy and orders to sell the same security, said parties must offer said security, whether it be stocks or bonds, at  $\frac{1}{8}\%$  higher than their bid before making transactions with themselves, but such transactions cannot be quoted when objected to."

with a custom of the trade permitting a stockbroker to sell on the exchange for one customer and to buy the same stock on the exchange for another customer, shall be stricken down as invalid in the absence of actual knowledge by the customers, although they know that there are rules and contract with their brokers with reference to such rules.

The employment of a stockbroker in the business of buying and selling on the stock exchange at the market price or for definite prices securities which find there a ready and immediate sale is of a peculiar nature. No discretionary authority is vested in the broker. Commonly, there is no opportunity for the exercise of judgment. The broker becomes a mere intermediary. There is no reasonable possibility for the broker, employed for selling an active stock at the market or at a stipulated price, to assume an antagonistic duty by buying the same stock on the same market for other customers. *Macoun v. Erskine Oxenford & Co.* [1901] 2 K. B. 493, 500. The duty is equal to both the buying and the selling customer and the element of temptation for personal gain or preference is reduced to a minimum, if not entirely eliminated. The practical effect of the rule ordinarily is to require the stockbroker to try to sell the stock to third persons at a better price than that set in his customer's order to buy, and to take it for that customer at that customer's price only after an unsuccessful effort to get a higher price for his selling customer or the customer whose stocks he is carrying. If this rule could not be upheld, possibly all three parties to the transaction might suffer. The buying customer later on might have to pay a higher price, the customer whose stocks are being carried might not get so high a price, and the broker carrying the stock for his customer might have to take a lower price and hence not be made good.

If there were special conditions showing a private gain to the brokers beyond the usual commission, or unfairness to either customer, a different case would be presented. *Erskine Oxenford & Co. v. Sachs*, [1901] 2 K. B. 504, 511, 513. Nothing of that sort is disclosed on this record. It is almost a matter of common knowledge that stockbrokers in large business often buy for some customers and sell for other customers on the same day considerable amounts of the same kind of stock. The prevalent method

of settling the balances of different brokers on the stock exchanges through the medium of clearing houses is founded on this kind of buying and selling. *Fiske v. Doucette*, 206 Mass. 275, 282.

Therefore, we are brought to the conclusion that, as to stocks of the plaintiff sold by the defendants as brokers for him and bought by them as brokers for others of their customers, such sales and purchases being in accordance with the rule and custom of the stock exchange, at market prices, without any circumstances indicating that in fact the plaintiff was not fairly dealt with, these sales were valid and binding. In this respect the ruling of the Superior Court was erroneous. To prevent misunderstanding, it may be added that this principle is confined to the facts here stated.

3. The defendants asked for rulings to the effect in substance that upon all the evidence the plaintiff must be held to have affirmed the sales (if any there were) made to the defendants directly on their own account and not as brokers for their other customers. These requests rightly were refused. The plaintiff could not act in the premises until facts came to his attention which would reveal to him the true situation. If he elected to rescind and avoid the sales, he was bound to act within a reasonable time after he knew the facts. *Bassett v. Brown*, 105 Mass. 551, 557. *Learned v. Foster*, 117 Mass. 365, 370. *Rogers v. Barnes*, 169 Mass. 179, 184. A person situated like the plaintiff was bound to act with reference not only to his actual knowledge, but he is also chargeable with such information as he might have obtained on inquiry, provided he knew of circumstances which would have put a man of ordinary intelligence upon an inquiry which would have revealed the truth. And knowledge which one has or ought to have is to be imputed to one in a position like that of the plaintiff. *Farnam v. Brooks*, 9 Pick. 212. *Johnston v. Standard Mining Co.* 148 U. S. 360, 370, 371. *Higgins v. Crouse*, 147 N. Y. 411, 416. The crucial facts appear not to have been established with sufficient clearness to require the giving of any of the rulings requested upon this point. The reception and retention of the check under all the circumstances was not decisive as matter of law, *McKay v. Myers*, 168 Mass. 312, *Worcester Color Co. v. Henry Wood's Sons Co.* 209 Mass. 105, however persuasive might be its force in determining the fact.

4. The rule of damages as to those sales which the plaintiff may set aside, laid down by the Superior Court, was that the plaintiff might "recover on the basis of the highest prices which could have been realized for such stocks between the time when the transaction referred to took place and the time when the plaintiff had notice or knowledge of the way in which these shares had been dealt with." This was an adoption of the rule of highest intermediate value. As has been pointed out, that is not the law of this Commonwealth and hence that ruling was erroneous. The plaintiff was at liberty to set aside such sales within a reasonable time after he knew of them and demand the return of the stocks. The trial seems to have proceeded without objection, under amendments to the declaration, upon the theory that he had elected to set aside these sales and demand the return of the stocks. The correct rule of damages to be applied, if the plaintiff should prove that the defendants made sales of stock to themselves, either real or fictitious, is that the plaintiff may recover the difference between the value of the stocks when sold and their value when the sales were made known to and repudiated by him, together with interest from that date.

The result is that the plaintiff is not entitled to recover anything more than nominal damages for the breach of the alleged special contract to carry shares of Copper Range Consolidated Mining Company stock, and hence there is to be no new trial on that issue. There is no right of recovery as to sales of stock made by the defendants as brokers for the plaintiff to themselves as brokers for other customers and made in accordance with the rules of the stock exchange and at market prices. The plaintiff's only ground for recovery is confined to the remainder of his declaration.

*So ordered.*

*R. M. Morse, (W. P. Everts with him,) for the defendants.*

*S. L. Whipple & A. Lincoln, (E. H. Abbot Jr. with them,) for the plaintiff.*



## DWIGHT F. KILGOUR vs. WILLIAM GRATTO.

Middlesex. January 19, 1916. — May 16, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, &amp; CARROLL, JJ.

*Municipal Corporations*, By-laws and ordinances, Officers and agents. *Nuisance*.  
*Mandamus*. Words, "By-laws."

In St. 1913, c. 655, § 1, providing that every city and town, except Boston, which accepts the provisions of the statute, "may, for the prevention of fire and the preservation of life, health and morals, by ordinances or by-laws not inconsistent with law . . . regulate the inspection, materials, construction, alteration, repair, height, area, location and use of buildings and other structures within its limits," the word "by-laws" means general rules which shall afford some standard of conduct to the landowner so that he may know where to locate, how to design, construct, equip and otherwise prepare for use his proposed building, and some principle to direct the licensing board as to the exercise of their judgment and discretion in granting or denying a permit.

A town is not given power or authority by St. 1913, c. 655, § 1, to adopt and enforce a by-law vesting in its selectmen the power in their absolute and uncontrolled discretion to refuse permission to erect a factory, however perfect in design, non-combustible in material, and safe and sanitary in equipment; and if, purporting to act under authority given by such a by-law, the selectmen refuse for no stated reason to grant permission for the erection of a factory which in every way conforms in design, material, safety and sanitary provisions to standards set by the town in an elaborate and comprehensive code of building by-laws, a writ of mandamus should issue to compel the granting of a permit.

Enumeration by RUGG, C. J., of classes of cases illustrating the regulation, that properly may be delegated to the discretionary supervision of a local board, of occupations and of uses of property which may create nuisances.

RUGG, C. J. This is a petition for a writ of mandamus to compel the building inspector of the town of Lexington to issue a permit for the construction of a one story building of cement blocks and brick upon the petitioner's land in Lexington, to be used as a drafting-room and mechanical laboratory or workshop, to contain some small machinery for the making of models and devices for testing, developing and illustrating his inventions; but manufacturing is to be carried on to a slight extent only, the maximum of workmen being four. Power is to be furnished by an electric motor. The department to which the petitioner's inventive skill

is directed is not stated. It has been found \* in substance that as a rule there is greater danger of fire, explosion or other like accident in a building used as a factory where a dynamo for motive power is set than in other buildings such as dwelling houses, with reference not only to the building itself but to other buildings in the vicinity, and that sometimes danger to the health of dwellers in neighboring buildings may be increased, by the location of a factory, beyond that which would be caused by a dwelling house, and that there are other buildings mostly of wood in close proximity to that proposed to be erected by the petitioner. There is no finding as to the danger in any particular respect which the petitioner's proposed building would be likely to cause.

The town of Lexington accepted the provisions of R. L. c. 104, which was the corresponding provision of the earlier law now embodied in St. 1913, c. 655. Section 1 of that act, so far as here material, is in a footnote, the additions to the words of the earlier statute being in italics.† Pursuant to the authority of the latter statute, the town adopted an elaborate and comprehensive code of building by-laws. The pertinent provisions of that code ‡ in brief are that no building shall be erected for use as a factory without a permit countersigned by the selectmen. The petitioner's

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\* By *Pierce, J.*, by whom the petition was heard, and who, having ordered that the writ should issue, at the request of the respondent reported the case for determination by the full court.

† "Every city, except Boston, and every town which accepts the provisions of this section or has accepted the corresponding provisions of earlier laws may, for the prevention of fire and the preservation of life, *health and morals*, by ordinances or by-laws not inconsistent with law and applicable throughout the whole or any defined part of its territory, regulate the inspection, materials, construction, alteration, *repair, height, area, location* and use of buildings and other structures within its limits, except . . ."

‡ "Article III. Definitions . . . Factory. Any premises where steam, water or other mechanical power is used in aid of any manufacturing process there carried on."

"Article X. Section 5. No buildings to be used as a factory, or for the manufacture of explosives, or for chemical or rendering works or stable in which more than four horses are kept, shall be erected, and no steam or gas engine, dynamo or boiler for motive power, shall be set or erected or moved without a permit from the Inspector, countersigned by the Board of Selectmen, and such permit shall not be granted until after a public hearing before the Selectmen. . . ."

proposed building is a factory within the code, because electrical power is to be used in aid of manufacturing processes to a small extent. The plans and detailed descriptions of the petitioner's proposed building in all structural respects conform fully to the requirements of the by-laws, which in this regard contain many minute regulations. But the selectmen refuse to grant the permit and no reason therefor is assigned in the record.

The effect of the by-laws is to vest in the selectmen an absolute and uncontrolled discretion whether to grant or to refuse a permit for the construction of a building like that proposed by the petitioner anywhere within the limits of the town.

The business proposed to be carried on by the petitioner is as harmless as can well be imagined of any manufacturing enterprise. It is a lawful business. The use of inventive skill is a close approach to the exercise of a natural right. In essence it is simply working toward useful ends according to the measure of one's innate endowments. The material and structure of the building confessedly satisfy the exacting requirements of the by-laws. The motive power proposed to be installed commonly is supposed to be as clean, healthful and free from danger under proper regulations as any now available. The construction and use of factories for manufacture at some place are necessities of present conditions of life. The question presented is whether the Legislature has authorized the passage by towns of by-laws which subject the right of everybody to construct a factory building to the unrestrained permission of local officers.

While the terms of St. 1913, c. 655, in some respects are broader than those of earlier statutes, in that under it the municipality may enact by-laws for the preservation of "health and morals" and may regulate the "repair, height, area, location" of buildings, they still must confine their regulations in this respect to "by-laws." "By-law," as applied to the subject matter, means a general rule. It should afford some standard of conduct to the landowner so that he may know where to locate, how to design, construct, equip and otherwise prepare for use his proposed building, and some principle to direct the licensing board as to the exercise of its judgment and discretion in issuing or denying the permit. A provision that the right to erect a factory, however perfect in design, non-combustible in material, safe and sanitary in equip-

ment, cannot be exercised without permission from local officers not enlightened, directed or curbed by any established principle, is not in a proper sense a by-law as that word is used in this statute.

Of course a wide power exists as to the regulation of harmful and noxious occupations and the location and erection of buildings for uses which either are inherently or easily may become nuisances. It is to be presumed that the legislative delegation of discretionary power respecting such buildings and businesses is broad. The keeping of swine, *Quincy v. Kennard*, 151 Mass. 563, the blasting of rock, *Commonwealth v. Parks*, 155 Mass. 531, the business of storing rags in thickly settled parts of a city, *Commonwealth v. Hubley*, 172 Mass. 58, the location of livery stables, *Newton v. Joyce*, 166 Mass. 83, *Reiman v. Little Rock*, 237 U. S. 171, the establishment of dairy and cow stables within a great city, *Fischer v. St. Louis*, 194 U. S. 361, and the construction of garages, *Storer v. Downey*, 215 Mass. 273, all have been held to relate to such matters as may be within the discretionary supervision of a local board.

But the statute has been held not to allow the enactment of ordinances or by-laws vesting entire and unregulated discretion in local officers respecting the construction, alteration and use of all buildings, *Newton v. Belger*, 143 Mass. 598, the erection and use of buildings for general manufacture, *Winthrop v. New England Chocolate Co.* 180 Mass. 464, and the erection of buildings for mercantile uses, *Goldstein v. Conner*, 212 Mass. 57. The case at bar is indistinguishable from these and is governed by them.

The change in the statute since their decision does not touch this aspect of the matter. The instant by-law does not undertake to regulate the location of factories by any general rule. The principles controlling this and kindred subjects have been fully discussed in recent cases and need not be restated. *Commonwealth v. Maletsky*, 203 Mass. 241. *Belmont v. New England Brick Co.* 190 Mass. 442. *Durgin v. Minot*, 203 Mass. 26. *Commonwealth v. McGann*, 213 Mass. 213. *Burke v. Holyoke Board of Health*, 219 Mass. 219. *Yick Wo v. Hopkins*, 118 U. S. 356. *Hadacheck v. Sebastian*, 239 U. S. 394. The trend of decisions in other jurisdictions goes at least as far and perhaps beyond any of our own adjudications in restricting the validity of similar by-laws. *Montgomery v. West*, 149 Ala. 311. *Sioux Falls v. Kirby*,

6 So. Dak. 62. *Richmond v. Dudley*, 129 Ind. 112. *Boyd v. Council of Frankfort*, 117 Ky. 199. *State v. Tenant*, 110 N. C. 609. See Dillon, *Mun. Corp.* (5th ed.) §§ 596, 598, 600.

*Writ to issue.*

*R. P. Clapp*, (*H. W. King* with him,) for the petitioner.

*S. R. Wrightington*, for the respondent.



DANIEL H. SHEEHAN *vs.* PERLEY R. EATON & another.

PERLEY R. EATON & another *vs.* DANIEL H. SHEEHAN.

Middlesex. March 6, 1916. — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Contract, Construction, Performance and breach. Evidence, Competency, Relevancy and materiality.*

At the trial together of two actions of contract, the first by a lumberman against a lumber dealer for a balance alleged to be due under a contract in writing for the sawing and piling of certain lumber, and the second by the dealer against the lumberman for the repayment of an alleged over-payment by the dealer to the lumberman, where a provision of the contract required that the lumberman should cause each board or plank to be measured "and mark the number of feet thereon, and shall guarantee this measurement, and it shall be measured again" by the dealer "when put on the cars," and providing for an adjustment in accordance with the correction of the lumberman's measurements by those of the dealer, it appeared that the lumberman caused measurements to be made and recorded, but that the dealer did not, but merely made a tally of the lumberman's recorded figures. *Held*, that such tally was not a compliance by the dealer with the requirements of the contract as to measurements by him.

At the same trial the dealer offered evidence of measurements made by purchasers of the lumber from him to the effect that the measurements marked thereon by the lumberman were too large. The evidence was excluded. *Held*, that the exclusion was proper, the evidence being incompetent.

It appearing that the only measurements made in accordance with the provisions of the contract were made by the lumberman, it was *held*, that his measurements were conclusive and binding upon the parties unless there was a mathematical error made by him in adding them.

Evidence offered by the dealer as to the result of the tally taken by him, which was excluded, tended to show that the total of the measurements recorded by the lumberman, 748,831 feet, was about 50,000 feet in excess of the tally. *Held*, that the evidence should have been admitted because it tended to show a palpable mathematical error by the lumberman in adding his measurements.

CONTRACT upon an agreement in writing for the sawing of lumber by the plaintiff for the defendants. Writ dated March 24, 1906; also

CROSS ACTION by the defendants in the first action against the plaintiff in that action upon the same contract in writing. Writ dated June 2, 1906.

The cases were referred to an auditor and were heard together by him and, after the filing of his report, by *Brown, J.*, without a jury. The material evidence is described in the opinion.

At the close of the evidence, the defendants in the first action asked the judge to rule as follows:

"2. The defendants' failure to measure the lumber at the car would not be a waiver of their right to question the measurement of the plaintiff or in effect amount to an agreement to adopt the plaintiff or the plaintiff's surveyor as a man mutually chosen to make the measurement."

In the second action, as plaintiffs, they asked the judge to rule as follows:

"3. The failure of the plaintiffs to measure the lumber at the car does not constitute Sheehan or Sheehan's surveyor a person agreed upon to take the measurement which measurement is binding and conclusive upon the parties in the absence of fraud. Neither does it preclude the plaintiff from setting aside or impeaching it except upon evidence such as would avoid the finding of an arbitrator mutually chosen or such evidence as would satisfy a jury that the surveyor had acted corruptly."

"7. The taking of the tally at the car is compliance with the terms of the contract."

"11. If the defendant, Sheehan, did not accurately mark the boards by himself or his surveyor or his agent, when the lumber was being sawed, but either under-marked or over-marked the lumber, this is a breach of the contract. If the defendant, Sheehan, first breached the contract, it is not open to him to complain that the plaintiffs afterwards breached the contract.

"12. The taking of the tally at the car by Eaton from the guaranteed figures of Sheehan on the boards is the measurement which is binding and conclusive on Sheehan and the total amount of this tally thus taken is at most all for which Sheehan can claim payment."

All the foregoing requests for rulings were refused.

The judge found for the plaintiff in the first action in the sum of \$459.16, and for the defendant in the second action; and the defendants in the first action, the plaintiffs in the second, alleged exceptions.

The cases were submitted on briefs.

*C. E. Tupper*, for Eaton and another.

*E. Fisher*, for Sheehan.

CROSBY, J. These actions arise out of a contract in writing entered into between the parties, whereby Sheehan agreed to "cut log and saw and put upon the sticks to dry, all the lumber upon a parcel of land known as the Morse Farm in Sudbury."

The sixth article of the agreement provides as follows: "Said Sheehan shall measure or cause to be measured each board or plank and mark the number of feet thereon and shall guarantee this measurement and it shall be measured again when put on the cars and if it over-runs said Sheehan's measure, Webber and Eaton shall pay Sheehan the over-run and if it falls short Sheehan shall make up the shortage at \$5.00 per M in both cases."

The bill of exceptions in the second case states: "The defendant in marking the lumber marked each board with the face measure, to wit: any board over one inch and less than two inches in thickness was marked as of one inch in thickness, leaving the fraction to be added. The plaintiffs through their employee, a Mr. Wilson, made a tally of the figures as shown upon the lumber when it was loaded on the cars. Nearly a year elapsed between the first and the last shipment of the lumber."

The plaintiffs in the second action contend that the lumber was not sawed in a workmanlike manner, and claim damage on account thereof; and also, that they have paid the defendant for a larger amount of lumber than has been actually sawed, and seek to recover for such over-payment.

The first action was brought by Sheehan to recover for a balance which he claims to be due for sawing the lumber.

The cases were referred to an auditor and were heard together. The auditor made a finding in favor of the plaintiff in the first action for the full amount of his demand and against the plaintiffs in the second action. Afterwards, the cases were heard by a judge of the Superior Court, without a jury, who made findings

in each case in accordance with the findings of the auditor. As substantially the same questions are raised by the exceptions in each case, they properly may be considered together.

We assume under article sixth of the contract that the second measurement to be made, when the lumber was put on the cars, was to be made by Webber and Eaton, the owners. This construction of the contract seems to have been adopted by both parties.

There was evidence to show that the boards were measured and marked by a surveyor employed by Sheehan, when stuck up by him upon the lot in accordance with the contract.

When put upon the cars by Webber and Eaton, instead of making an actual measurement of the lumber, they caused a "tally" thereof to be made by their employee (one Wilson). This tally was made by copying into a book the figures as shown upon the boards when they were loaded upon the cars.

Sheehan offered evidence to show that by actual measurement he had sawed 748,831 feet, while Webber and Eaton offered to show that the total markings upon the boards as made by Sheehan and shown by the tally amounted to but 694,212 feet.

It was agreed that the plaintiffs in the second action had paid the defendant for sawing 700,000 feet.

The judge rightly refused to rule that the tally at the car was a compliance with the terms of the contract. It is plain that it was not a measurement of the lumber as called for by the contract. It was merely a copy of the measurements as made by Sheehan. The latter was entitled to have an actual measurement made by Webber and Eaton. Besides, unless so measured, the provision of the contract "that if it [the measurement] over-runs said Sheehan's measure, Webber and Eaton shall pay Sheehan the over-run and if it falls short Sheehan shall make up the shortage at \$5.00 per M in both cases," became wholly ineffective.

The evidence offered by Webber and Eaton of measurements made of lumber by purchasers to whom the lumber had been shipped by them, showing that it was over-marked, was incompetent, and therefore was rightly excluded.

The exclusion of the evidence of the tally taken at the car, which was offered to disprove the measurements of the lumber as made by Sheehan, presents the principal question raised by the exceptions in these cases.



It is immaterial whether Sheehan is made a referee or an arbitrator under the contract or not, because whether he was such or not, evidence of mistake in the addition of his measurements is competent.

The only measurement made as provided by the contract was made by him. That measurement is conclusive and binding upon the parties, unless there was a mathematical error made by him in adding such measurements. Upon this question, the evidence of the tally was admissible. *Palmer v. Clark*, 106 Mass. 373. *McGurk v. Standard Plate Glass Co.* 207 Mass. 583, 585.

The evidence that the total amount of the measurements as claimed to have been made by Sheehan was over fifty thousand feet in excess of the tally, is evidence of a palpable error and mistake, assuming that the tally includes all boards actually sawed and is correctly transcribed therefrom. Accordingly evidence of the tally was admissible to show that such error existed.

All of the requests by the plaintiffs in the second action were rightly refused as either unsound in law or inapplicable to the facts.

The exception of the defendants in the first action to the refusal to give the second request is sustained.

It follows that the entry must be

*Exceptions sustained.*

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#### GEORGE A. VEBER'S (dependent's) CASE.

Suffolk. March 8, 1916. — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Workmen's Compensation Act, Dependency. Husband and Wife.*

A married woman, who at the time of her husband's death was living apart from him merely on account of his inability to obtain and perform sufficiently remunerative work to provide a home for his wife and child, cannot be found to have been living apart from him for justifiable cause within the meaning of St. 1914, c. 708, § 3 (a) in the amendment of § 7 of St. 1911, c. 751, Part II.

Where in the presentation of a claim under the workmen's compensation act by the alleged dependent widow of an employee who at the time of his death was living apart from him by reason of his inability to provide a home for his wife

and child, it appears that the employee during a married life of more than twelve years paid doctors' bills, grocery bills, bought clothes for the child and gave money to his wife amounting in all to between \$200 and \$300, it is the duty of the Industrial Accident Board to determine in accordance with the fact under St. 1911, c. 751, Part V, § 2 and under the last paragraph of Part II, § 7 (c) as amended by St. 1914, c. 708, § 3, whether the widow was dependent upon her husband at the time of the injury that caused his death.

PIERCE, J. On October 13, 1914, the deceased employee met his death through an injury in the course of and arising out of his employment. He was married on March 16, 1902, and left a widow and a child about thirteen years of age. During the entire period of his married life he was a desultory common laborer.

There was no evidence that he was addicted to vice, cruel in his conduct, or that he refused or neglected to furnish and provide for his wife adequate support so far as he was able to do so. The husband and wife lived together at the home of the mother of the husband, or at that of the mother of the wife, from the time of their marriage until May, 1903. During this period the husband sometimes earned \$5 per week and their board and at other times only their board.

Between 1903 and 1910 he worked on farms, in quarries, in stables, on the State roads and in cutting ice, as he got jobs in one town or another for short periods of time. During this time the husband and wife sometimes lived together for two or three months "at her mother's, his mother's, his sister's or his uncle's." They never hired a house or a tenement, and sometimes did not see each other for a month. They lived together for five weeks in 1911; the month of June, 1912; a week in August, 1913, and a month one winter at Pittsfield. In March, 1914, the husband came to the house of his mother and had dinner with them. In April, 1914, the wife went to work at Onset and remained until September 22, 1914. When she arrived home her mother told her that her husband had been there and wanted her, his wife, to go to Chester and live with him. The last time the wife saw the husband was on September 30, 1914, when she was hurrying to a train.

During the years of their married life, he paid doctors' bills, grocery bills, bought clothes for the child, and gave money to his wife aggregating between \$200 and \$300.

Upon the evidence, all of which is reported, the Industrial Accident Board ruled that, at the time of his death, the wife was living

apart from her husband for justifiable cause, and the insurer appealed. See *Herrick's Case*, 217 Mass. 111; *Fisher's Case*, 220 Mass. 581.

This ruling cannot be sustained. It is clear that the inability of the husband to obtain and to perform sufficiently remunerative permanent work was the cause of his failure to provide a home for his wife and child, and that their living apart was chargeable to his mental and physical deficiencies and characteristics and not to his wilful neglect. The case at bar is governed by *Newman's Case*, 222 Mass. 563. In consideration of the evidence that the husband paid doctors' bills, grocery bills, bought clothes for the child, and gave money to his wife aggregating between \$200 and \$300, the Industrial Accident Board should have determined as a fact whether the widow was dependent upon her husband at the time of his death under St. 1911, c. 751, Part V, § 2, and Part II, § 7 (c) as amended by St. 1914, c. 708, § 3.

The case is to be recommitted to the Industrial Accident Board, where the widow may move for a hearing and the introduction of further evidence. If the motion is granted, and upon further hearing dependency to any extent in fact shall be made to appear, the case should be considered anew. Otherwise, a finding must be made in favor of the insurer.

*So ordered.*

*C. D. Driscoll*, for the insurer.

*L. F. Hardy & G. W. Gordon*, for the dependent widow, submitted a brief.

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NEW YORK CENTRAL RAILROAD COMPANY & another *vs.* AUGUST SWENSON.

Norfolk. March 14, 1916. — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Eminent Domain, Way, Private, Extinguishment. Evidence, Self-serving statement, Of intention. Railroad.*

If an instrument of taking by right of eminent domain of a certain location by a railroad corporation contains no language to show that a private way which crosses the location is extinguished, the mere facts that, upon the map which

the corporation filed with the county commissioners is the statement "This location covers and includes all the land lying between the lines tinted red on said map," and that the "lines tinted red" crossed black lines designated as the lines of the private way, do not show that the private way where it crossed the location was extinguished by the taking.

Where land or an interest in land is taken by right of eminent domain, the description in the instrument of taking should be as definite and certain as is necessary for a conveyance of land by a deed.

If the language used in an instrument of taking by eminent domain is so ambiguous and obscure as to make uncertain the nature and extent of the taking, the taking will be held to be invalid.

Where, at the trial of a suit by a railroad corporation to enjoin one claiming a private right of way across the railroad location from using such way, the plaintiff contended that so much of the way as crossed the location was extinguished by the taking of the location and the meaning of the instrument and plan which were filed when the taking of the location was made is an issue, evidence of what the corporation intended by the filing is incompetent, the question being, not what the corporation intended to do, but what it did.

CROSBY, J. This is a bill in equity brought to enjoin the defendant from crossing the location of the plaintiff's railroad in the town of Wellesley. The defendant is the owner of a certain parcel of land in Wellesley north of, but not adjoining, the plaintiff's location above referred to. The deed under which the defendant acquired title to his land is dated June 21, 1887, and it is agreed that until July 11, 1888, when a new location for the railroad was filed under the provisions of St. 1887, c. 430, the defendant was the owner of a right of way as appurtenant to his land over the tracks of the plaintiff's railroad upon Everett Street so called, a private way, to Washington Street in Wellesley.

The judge of the Superior Court,\* by whom the case was heard, found in effect that the defendant's right of way had been extinguished by the new location filed by the plaintiff on July 11, 1888, and the principal question to be determined is whether, upon the evidence, that finding was plainly wrong.

The plan marked "D" which was filed with the county commissioners of Norfolk County and made a part of the location of July 11, 1888, shows the side lines of the railroad location as extending across Everett Street, and the side lines of Everett Street as extending across the railroad location. Upon this plan Everett Street is indicated as a "Private Way" and is delineated thereon by black lines.

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\* *Jenney, J.*, who made the decree granting the injunction prayed for.

The defendant contends that the way was not extinguished by the new location, but was expressly recognized thereby. Evidence was admitted at the hearing tending to show that immediately after the filing of the location in 1888 the planking between the rails where Everett Street had crossed the tracks was removed and a fence was erected on the north side line of the plaintiff's location cutting off travel across the tracks at Everett Street. There was also evidence that a sign was erected by the selectmen of Wellesley warning persons that crossing the railroad at this place was prohibited.

The plan and the written location are to be considered together. Such a plan is of the same effect as if referred to in a deed, and is a substantial part of the description. *Hazen v. Boston & Maine Railroad*, 2 Gray, 574.

We are of opinion that the taking by the railroad company is free from uncertainty or ambiguity. There is nothing in the instrument of taking or the accompanying plan to show that the easement of the defendant in Everett Street was extinguished. The legend upon the plan,\* which recites that "This location covers and includes all the land lying between the lines tinted red on said map," is not inconsistent with the continued existence of the easement. Unless the taking by the railroad company included

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\* The complete legend was as follows:

"A New Location  
of the Boston and Albany R. R. at Two Points  
in the Town of Wellesley and County of Norfolk, Massachusetts.  
Authorized by Chapter 430 of the Statutes of 1887.

"In accordance with the provisions of chapter 112 of the Public Statutes of the Commonwealth of Massachusetts and chapter 430 of the statutes of 1887, the Boston & Albany Railroad Company makes and files this new location of its railroad at two points in the town of Wellesley, county of Norfolk in said Commonwealth, as shown on the accompanying map in three sheets and statement of alignment in one sheet, which map and statement are hereby made a part of this location, not meaning or intending to abandon or relinquish any rights which it may possess under any former location made by it.

"This location covers and includes all the land lying between the lines tinted red on said map. The base line of this location is shown on said map in red and is defined by stone monuments set in the ground.

"The said statement of the alignment shows the true courses and radii of the base line. The distances of the outside lines of location from the base line are stated in figures on said map."

all the land between the side lines of its location where it intersected Everett Street, the plaintiff would have no right to cross over that street, but its location would end at the side lines of the street. In other words, the railroad company could not do less than take all the land within the side lines of its location. It follows, that the taking as described by the legend on the plan does not of itself extinguish the easement of the defendant, but the land within the side lines of the railroad and the side lines of Everett Street is subject to two easements, namely, the easement of the railroad and the easement of the private way. The plan shows the side lines of the railroad location as crossing Blossom Street, a public way, in precisely the same manner that they cross Everett Street. This would seem to make it certain that the legend on the plan and the plan itself did not extinguish that part of Everett Street within the "lines tinted red on said map."

An examination of the entire record fails to show that the easement of the defendant was lost by the relocation of the plaintiff's railroad filed on July 11, 1888.

If the question, whether the relocation of the railroad did or did not result in the extinguishment of the easement, was doubtful, which we do not find, the result would be the same. Where land or interests therein are taken by eminent domain, the description in the instrument of taking should be as definite and certain as is necessary for a conveyance of land by deed. If the language used is so ambiguous and obscure as to make uncertain the nature and extent of the taking, it will be held to be invalid.

It was said by this court in *Glover v. Boston*, 14 Gray, 282, at page 288, "Upon the record of the laying out alone, it must at best be regarded as extremely doubtful; and the plan excludes it altogether. The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority which interferes with his rights should be, as it always may be, clear and intelligible." *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365. *Appleton v. Newton*, 178 Mass. 276. *Harding v. Biggs*, 172 Mass. 590.

An examination of the original records, together with the accompanying plans, in the cases of *Googins v. Boston & Albany*

*Railroad*, 155 Mass. 505, *Humphreys v. Old Colony Railroad*, 160 Mass. 323, and *Hamlin v. New York, New Haven, & Hartford Railroad*, 166 Mass. 462, cited and relied on by the plaintiff, shows that they are not at variance with the views herein expressed.

The evidence offered by the plaintiff to show what it intended by the filing of the relocation was incompetent. The question to be determined was not what the railroad company intended to do by filing the location, but what was the proper construction of the act done as shown by the location and accompanying plan? Upon that question, contemporaneous construction given by both parties was admissible. So also evidence of admissions was competent. As was said by Allen, J., in *Humphreys v. Old Colony Railroad*, *ubi supra*, in referring to evidence of an admission by the railroad, "This in a case otherwise doubtful would be strong evidence to show that all the parties, including the railroad company, understood that the crossing was not to be closed." Where, as in the case at bar, the question of the effect of the relocation was in dispute between the parties, evidence as to what one of the parties to the written instrument intended thereby was clearly inadmissible. The evidence admitted amounted merely to self-serving statements by the railroad company.

The burden of proof was on the plaintiff to show that the pre-existing right of way was extinguished by the location. For the reasons stated, we are of opinion that it has not sustained the burden of proof which rests upon it to show that the defendant's right of way was extinguished. It appears that before the new location the plaintiff railroad owned the fee in so much of Everett Street as is included within the side lines of the new location; but this is not of consequence. The effect of the new location is the same throughout and is to be taken as a whole.

It follows that the decree must be reversed and the bill dismissed with costs.

*Ordered accordingly.*

The case was submitted on briefs.

*H. A. Plympton & H. L. Perrin*, for the defendant.

*R. A. Stewart & E. S. Kochersperger*, for the plaintiff.

## WILLIAM M. LYNCH vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 15, 1916 — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; CROSBY, JJ.

*Negligence*, In use of highway, In use of automobile ladder truck by fire department, Traffic rules, Imputed.

If a captain in the fire department of a city is in charge of an automobile ladder truck thirty-six feet in length and four and one half tons in weight, and is sitting beside the driver while an agent of the manufacturer of the truck is instructing members of the department how to handle it, and if the truck is driven along a street at the rate of from ten to fifteen miles an hour toward a crossing with a street about thirty feet wide upon which there is a double line of street car tracks, and if the driver's view of street railway cars approaching from his left is such that, by reason of a building built to the line of the sidewalk he has an unobstructed view of the track to his left for about ninety-five feet when he is thirty feet from the nearer car tracks, and if neither the driver nor the captain look up the track to their left until they are about eleven feet from the track, when they see a street car, negligently driven, about two car lengths away and are unable to stop the truck in time to avoid a collision, a finding, in an action by the captain against the street railway company for personal injuries so received, that the plaintiff was in the exercise of due care, is not warranted, whether he be judged by his own conduct or by that of the driver of the truck.

Article 3, § 1, of the street traffic regulations of the city of Boston, which provides that "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession," has no application to an automobile ladder truck of the fire department which, in charge of a captain of the department, is upon a street merely in order that an employee of its manufacturer may instruct the fireman in its operation.

DE COURCY, J. The plaintiff was injured in a collision on December 11, 1912, between an automobile ladder truck of the Boston Fire Department and a street railway car of the defendant at the junction of P Street and Third Street in South Boston. These streets cross each other at right angles. In P Street (which runs north and south and is about thirty feet wide) there is a double line of car tracks. The first rail of the northbound track is eight feet six inches from the easterly curbstone and ten feet eleven inches from the crosswalk of Third Street.

The ladder truck was about thirty-six feet long and weighed four and a half tons. An agent of its manufacturer was instruct-



ing the men how to handle it and at the time of the accident was standing on the right hand running board. Two members of the fire department were standing on the left hand running board. The plaintiff, Captain Lynch, was in charge of the truck and was seated on the front seat, and at his right was sitting the driver Callahan, who was at the wheel.

The truck proceeded westerly along the right hand side of Third Street at a speed of from ten to fifteen miles an hour. The building at the southeast corner of Third and P Streets extended to the line of the sidewalk, and, until he approached the crosswalk, would obstruct the plaintiff's view to the left of any approaching northbound car on P Street. Presumably he could not hear the noise made by a moving car because the large brass fire bell was being rung continuously. A street railway car was liable to approach Third Street on the nearer track at any time, and the length of the truck would make it difficult to avoid a collision either by turning into P Street or by crossing the track in front of such car.

The situation was peculiarly one where reasonable care for their safety called upon the plaintiff and the driver to look to the left along P Street for an approaching car at the earliest opportunity and to slow down the truck or otherwise have it under control for a quick stop. There was no occasion for hurry, and nothing to distract their attention.

Yet there is no evidence that any of the men looked until the wheels of the truck were on the crosswalk, or about eleven feet from the track. The front of the electric car was then a car's length or less away, according to Callahan; or twenty-five or thirty feet on the plaintiff's testimony; and no one places it more than two cars' length away. Apparently every effort then was made to stop the truck, and the plaintiff testified that if they had six inches more the truck would have stopped without hitting the side of the car. This only emphasizes the fact that the failure to look seasonably contributed to the accident. It is apparent from the plan used at the trial that, when the plaintiff was twenty feet from the first rail,\* his view of the track along P Street in the

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\* This point was on the front line, extended, of the building on the southeast corner. At a point thirty feet from the nearest rail the plaintiff had an unobstructed view of the tracks southerly for ninety-five feet from the place of the collision.

direction of the approaching car was wholly unobstructed; and that even before reaching the line (extended) of the building, he had a gradually increasing view along the track.

It may be assumed that there was evidence for the jury of the motorman's negligence. As a general rule, the facts disclosed in collisions of vehicles at intersecting streets make the issue of the plaintiff's due care one for the determination of the jury. *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104. *Driscoll v. Boston Elevated Railway*, 223 Mass. 533. But whether the plaintiff be judged by his own conduct or by that of the driver under his charge and control (see *Shultz v. Old Colony Street Railway*, 193 Mass. 309, 323), we cannot say that the record shows evidence which would warrant a jury in finding that he exercised reasonable care: and he is precluded from recovering under the authority of cases like *Hurley v. West End Street Railway*, 180 Mass. 370, and *Ferguson v. Old Colony Street Railway*, 204 Mass. 340.

Article 3, § 1, of the Street Traffic Regulations and Rules for Driving,\* even if applicable under the circumstances, does not help the plaintiff.

*Exceptions overruled.*

*J. P. Walsh*, (*W. J. McCarty* with him,) for the plaintiff.

*E. P. Saltonstall*, (*R. S. Pattee* with him,) for the defendant.

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INTERNATIONAL TRUST COMPANY *vs.* PAIGE MOTOR CAR COMPANY OF NEW ENGLAND.

SAME *vs.* CHANDLER MOTOR CAR COMPANY OF NEW ENGLAND.

Middlesex. March 22, 1916. — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Payment.*

Where the maker of a check that had been deposited in a bank by the payee stopped payment of it and, after payment was refused, one acting in behalf of the payee deposited in the bank to his own credit his own check for an amount sufficient to

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\* This article reads as follows: "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession."

cover the payment of the unpaid check as security to guarantee the bank against loss in enforcing payment of the unpaid check, whereupon the bank put the deposited check through the clearing house in the usual way and held the proceeds of that check in place of the check itself, it was *held*, that this did not constitute payment of the unpaid check and that, in an action brought by the bank upon such unpaid check against its maker, these facts were not admissible as evidence of payment or on any other ground of defence.

TWO ACTIONS OF CONTRACT by the International Trust Company, a corporation, the first action on a check made by the defendant in the first case, and the second action on two checks made by the defendant in the second case. Writs dated August 22, 1913.

In each case the defendant filed an answer containing a general denial and allegations of payment and of want of consideration.

In the Superior Court the cases came on for trial together before *Bell, J.*, and it was agreed by the parties that no jury should be impanelled unless it should be decided that the evidence stated in an offer of proof to be made by the defendants should be admitted as a defence to the actions.

For the purposes of the offer of proof the facts alleged in the plaintiff's declaration in each of the actions were admitted by the defendants. The defendants, through their counsel, then made the following offer of proof:

"I offer in the first place a letter signed by W. A. Castle, who is admitted to be the brother of H. C. Castle, who is the payee of the checks in suit, which letter was addressed to and received by the plaintiff, the International Trust Company, as follows:

""New York, Aug. 26, 1913.

International Trust Co.,  
Boston, Mass.

Dear Sirs: —

In confirmation of agreement reached yesterday between Mr. Graham and myself I am enclosing herewith my check on the Nat'l Shawmut Bank for \$8,208.32, which is the amount of overdraft now standing on your books charged to Henry C. Castle. This check according to our agreement is to be deposited to my credit in your bank to be retained by you as security for any losses the bank may sustain by reason of its failure to collect from the Chandler Motor Car Co. (and or) the Paige Motor Car Co. the amt. of certain unpaid checks of those companies heretofore de-

posited with you to the credit of W. A. Castle and now held by you aggregating \$9,430.

In receiving this check from me as such security you are, if I so desire, to keep alive and prosecute with reasonable diligence in your name but for my benefit such suit or suits as your company had already commenced against the Chandler Motor Car Co. (and or) the Paige Motor Car Co. The expenses of said suit except those already incurred to be borne by me and I to have the privilege of employing other counsel than the counsel now appearing for you, if I desire, and in general to co-operate with me in all reasonable ways in enforcing payment of said unpaid checks.

It is also understood that the demand note now held by you for \$4,800, signed by Henry C. Castle and endorsed by Edith R. Castle, is to be transferred to me. The above terms are, as I understand, the same as agreed to yesterday in my conversation with Mr. Graham.

Very truly yours.

W. A. Castle.'

"I further offer to prove that the check stated to be enclosed in that letter for the sum of \$8,202.32 was in fact received by the International Trust Company; was put through the clearing house in the usual way and the proceeds received by the International Trust Company, and that those proceeds have remained in the possession of the International Trust Company from that day to the present time.

"I further offer to prove that the amount of money covered by those proceeds (\$8,202.32) together with a small balance to the credit of Henry C. Castle, before payment was stopped on the checks in suit, make the total amount which the International Trust Company paid out when it cashed the checks of the defendants and that accordingly the International Trust Company has been paid in full on the checks now in suit."

The judge ruled that this offer of proof did not constitute a defence, and the defendants excepted. The judge then ordered verdicts for the plaintiff in the amount of the checks with interest; and the defendants alleged exceptions.

The cases were submitted on briefs.

*P. R. Ammidon & A. I. Bicknell*, for the defendants.

*J. E. Eaton, E. T. McKnight & C. T. Cottrell*, for the plaintiff.

DE COURCY, J. It is admitted for the purposes of the offer of proof, that the check of the Paige Company and the two of the Chandler Company were delivered by them, respectively, to one H. C. Castle, were payable to his order and were indorsed by him to the plaintiff; and that the plaintiff is the owner and holder of them. These actions were brought after the defendants had stopped payment of the checks.

In our opinion the trial judge was correct in ruling that the offer made did not constitute a defence. The letter of W. A. Castle, dated some days after these actions were instituted, shows that he deposited to his own credit in the plaintiff's bank a check for a certain sum of money as security to guarantee the plaintiff from loss in enforcing payment of the unpaid checks. The fact that the plaintiff cashed and held the proceeds of this check, instead of retaining the paper itself, must have been contemplated as the ordinary business method of dealing with it, and the plaintiff acquired thereby no additional title to the proceeds.

The evidence offered would not warrant the conclusion contended for by the defendants, namely, that the plaintiff has been paid in full on the checks. Nor does the offer of proof support any other defense set up in the answers.

In each action the entry must be

*Exceptions overruled.*

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PACIFIC SURETY COMPANY OF CALIFORNIA vs. CHARLES TOYE.

Suffolk. March 22, 1916. — May 16, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Contract, Construction, In writing. Bond.*

Where an application to a surety company to become surety on a bond to prosecute an appeal from a municipal court has written upon its margin the words, "Premium, \$5," and the provision as to a premium reads as follows, "To pay the said Company . . . a premium of        dollars (\$        ) annually in advance so long as said bond shall remain in force," the judge presiding at the trial of an action of contract for premiums after the first year should supply the word "five" where the omission occurs, especially where there is oral evidence, admitted without objection, that such was the mutual understanding and agreement of the parties.

DE COURCY, J. In September, 1910, the defendant, an attorney at law, induced the plaintiff to become surety on the bond of his client, one Hazel Mills, to prosecute an appeal from a judgment rendered against her in the Municipal Court of the City of Boston. The instrument containing the application and agreement to indemnify the said surety company was signed by the defendant, and a premium of \$5 was paid upon the issuing of the appeal bond. The case was still pending in the Superior Court, and the bond was in full force, when this action was brought to recover four unpaid annual premiums.

The presiding judge \* excluded certain offers of proof made by the plaintiff, evidently assuming that the application and indemnity agreement embodied the complete and final record of all the terms agreed upon between the parties. But even on this assumption we do not think he was justified in ordering a verdict for the defendant. The agreement expressly provided for the payment of a premium to the company annually in advance so long as the bond should remain in force. The obvious failure to fill in the blank space where the agreement recited "a premium of dollars (\$ ) annually" † cannot reasonably be interpreted as showing that the parties meant "an annual payment of nothing at all" as the defendant contends. The payment of an annual premium not only is customary, but was expressly contemplated. In the margin of the application part of the agreement appear the words "Premium, \$5.00." This well may be interpreted as defining the amount of the annual payment. In the light of the context, and in view of the contract as a whole, it seems apparent that it was intended to insert the word "five," where the obvious omission occurs. Accordingly, this will be supplied by the court; especially as there was oral evidence, admitted without objection, that such was the mutual understand-

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\* *Dubuque, J.*

† The paragraph in the application containing the agreement as to premiums was as follows:

"(1) To pay the said Company, at its office in Boston, Massachusetts, a premium of                      dollars (\$                      ) annually in advance so long as said bond shall remain in force and until evidence of the discharge or satisfaction thereof, satisfactory to the Company, has been served upon the Company at its Home Office in San Francisco, California;"

ing and intention of the parties. *Sweetser v. French*, 13 Met. 262. See *Clark v. Higgins*, 132 Mass. 586, 589; Hammon on Contracts, § 404.

In view of this conclusion as to the interpretation of the written contract, it is unnecessary to consider the further argument of the plaintiff as to the admissibility of parol evidence, based on the assumption that the written instrument was incomplete or ambiguous.

*Exceptions sustained.*

The case was submitted on briefs.

*A. M. Schwarz & S. A. Dearborn*, for the plaintiff.

*C. Toye*, *pro se*.



MICHELE LAPORTA vs. NEW YORK CENTRAL RAILROAD COMPANY.

Suffolk. March 27, 1916. — May 16, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, Licensee, Invited person, Wanton and reckless misconduct, Railroad.*

Where an employee of a contractor with the acquiescence of a railroad corporation enters upon its property for the purpose of crossing a track to borrow a tool for his employer from the corporation and is struck and injured by a locomotive engine, he cannot recover in an action of tort against the corporation for his injuries so received without proving that his injuries were caused by wanton and reckless misconduct of the defendant or its employees.

One who enters upon premises of another on business of his own and with a reasonable expectation of gratuitous favors to be given to him there by the owner of the premises does not have the rights of an invited person as distinguished from those of a licensee.

TORT for personal injuries alleged to have been sustained by the plaintiff from being struck by a railroad train of the defendant while he was at work in the employ of the Hugh Nawn Contracting Company close to the defendant's railroad track near an overhead bridge which crossed the track at a curve thereof, the declaration alleging that the plaintiff was at work for his employer on the defendant's premises by the invitation or with the knowledge and consent of the defendant or by the invitation or with the knowledge and consent of the defendant corporation

that the Hugh Nawn Contracting Company and its employees should then work on or within the defendant's premises. The defendant was alleged to have been negligent by reason of the speed of the train, a failure to ring the bell or sound the whistle on the locomotive, whereby it came suddenly and swiftly from under a bridge that concealed its approach, and a failure to warn the plaintiff by signal or otherwise of the danger. Writ dated August 27, 1912.

In the Superior Court the case was tried before *Brown, J.* It appeared that the Hugh Nawn Contracting Company was engaged in filling land of the Commonwealth on Charles River, north of and adjoining the defendant's location west of the Essex Street Bridge, with gravel loaded at the defendant's Essex Street yards and hauled in cars propelled by the defendant's locomotives on tracks not built nor controlled by the defendant from the Boylston Street subway to a switch at Cottage Farm whence they were sent back and delivered to the contracting company upon the temporary tracks being used for its work.

Other evidence is described in the opinion.

At the close of the plaintiff's evidence a verdict was ordered for the defendant; and the plaintiff alleged exceptions.

*J. W. Pickering, (J. Vecchioni with him,)* for the plaintiff.

*G. L. Mayberry, (L. A. Mayberry with him,)* for the defendant.

PIERCE, J. Assuming, but not deciding, that the testimony offered by the plaintiff and excluded by the presiding judge upon the objection of the defendant should have been received, and that the plaintiff's several offers of proof are incorporated as evidence in the report, it could be found by the jury that the defendant undertook to furnish, and did furnish, steel and ties to the plaintiff's employer for its use upon land adjacent to the location of the railroad of the defendant and not owned or controlled by the defendant; that the tracks of the railroad were between the place where the steel and ties were deposited by the defendant and the land upon which the employer of the plaintiff was expected to use them; that the defendant knew that the employer of the plaintiff and his men had to cross the railroad tracks to reach the land upon which the steel and ties were to be used and were used, and that no objection was raised thereto; that the defendant owned and kept in its tool house, which was near the



Essex Street Bridge and across the tracks from the land where the employer of the plaintiff was doing work, certain tools and implements such as crowbars, bars, jacks, push cars, etc.

There is no evidence that the defendant undertook to furnish to the employer of the plaintiff any tools or implements; nor is there any direct evidence that the keeper of the tool house had authority to permit the use of tools or implements by any one other than a servant or employee of the defendant.

The jury, however, reasonably might find that the defendant had knowledge that its keeper of the tool house lent its tools and implements to the servants and employees of the plaintiff's employer, as needed in the prosecution of their work, and might infer from all the circumstances that the defendant sanctioned, if it had not directed, the action of the keeper.

It also could be found that immediately before the accident the plaintiff and another, by the direction of their boss, crossed the tracks of the railroad of the defendant to fetch a jack; that they found one owned by the defendant "at a place opposite the coal sheds, about forty paces from the wooden bridge, beside the rail nearest the river, of the outer track, on which trains came from Boston." The plaintiff testified: "We stooped down, and we were going to pick it up and put it on our shoulders. I looked back up and down to see if any train was coming. Then we started to pick up the jack to put it on our shoulders. Then the engine came out so sudden and struck me on the side and knocked me down."

The evidence warranted a finding that the whistle was not blown, nor the bell rung, nor other warning given of the approach of the train as it came out from the bridge. There was no evidence that it was customary to give warning of the approach of trains at this point, or that the train was run in any other than the usual way; and it did not appear how far a train coming down the Grand Junction Branch of the Boston and Albany Railroad main track could be seen by one standing where the plaintiff stood.

We need not determine whether the plaintiff's employer and the employer's servants had the rights of one acting on invitation or of one exercising a license during the time they were engaged in the removal of the steel and ties from the defendant's premises, as the accident did not happen in the course of such work.

The plaintiff contends that his employer and the defendant had mutual interests in the general transportation of the gravel, and in its delivery; that it was to their common interest to push forward the work expeditiously, and that the loan of tools and the entry upon the location of the railroad to get and to return them was in furtherance of that interest and, therefore, upon an implied invitation. This contention has no basis of fact in the reported testimony.

Eliminating this contention, the plaintiff's case rests necessarily upon the proposition that a person who enters upon the premises of another on business of his own, with reasonable expectation of gratuitous favors, has the rights of an invitee as distinguished from those of a licensee. This is not the law. See *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225; *Plummer v. Dill*, 156 Mass. 426; *Shea v. Gurney*, 163 Mass. 184; *Hillman v. Boston Elevated Railway*, 207 Mass. 478; *O'Brien v. Union Freight Railroad*, 209 Mass. 449.

There is no contention that the acts of the defendant were intentionally injurious to the plaintiff, or wanton and reckless.

It follows that the ruling was right, and by the terms of the report \* judgment for the defendant is to be upon the verdict.

*So ordered.*



MARY A. WEBB vs. GEORGE E. LOTHROP & another.

Suffolk. October 20, 1915. — May 17, 1916.

Present: RUGG, C. J., LORING, CROSBY, & CARROLL, JJ.

*Bills and Notes, Validity, Ratification. Mortgage. Equity Jurisdiction, To have note and mortgage declared void for duress. Duress. Equity Pleading and Practice, Appeal, Exceptions to ruling of master. Compounding of Felony. Evidence, Relevancy, Remoteness.*

A note and a mortgage securing the note, procured to be signed by duress exerted upon the maker and mortgagor, are voidable merely and not void, and therefore can be ratified and confirmed by the maker and mortgagor.

If a woman under duress executes and delivers a note and a mortgage securing it

\* By *Brown, J.*, before whom the case was tried and who, at the close of the plaintiff's evidence, ordered a verdict for the defendant.

in consideration of a return to her of documents which might have been the basis of criminal proceedings against her husband and also of the transfer to her of several mortgages, and, during the next eight months, while consulting counsel, makes monthly payments of interest upon the note, destroys the documents incriminating her husband and realizes \$4,870 upon the mortgages transferred to her, she must be taken to have ratified and confirmed the note and mortgage so that she is unable to maintain a suit in equity to have them declared void and to enjoin the foreclosure of the mortgage.

Where at the hearing of a suit in equity the evidence was taken by a commissioner, the plaintiff, on an appeal from a decree dismissing the bill, may rely upon contentions not made before the trial judge.

In the present suit to enjoin the foreclosure of a mortgage, on an appeal from a decree dismissing the bill, the evidence having been taken by a commissioner and being before this court, the plaintiff for the first time contended that the evidence showed that the note and mortgage were void because their consideration was the compounding by the defendant of a felony of the plaintiff's husband or the stifling of a criminal prosecution against him, but this court *held*, that, upon the facts and inferences to be drawn from them, the plaintiff had failed to sustain the burden of proving that there was a contract to compound a felony or to stifle a criminal prosecution.

In a suit in equity, one of the issues to be heard by a master was the extent of indebtedness between the plaintiff's husband and the defendant, and the master found that certain notes of the plaintiff's husband never were protested by the defendant and that no specific demand was made upon them until a general demand for the settlement of the entire indebtedness, and that the course of dealing between the plaintiff's husband and the defendant had been such that there was an implied waiver of the necessity of demand, notice or protest. The plaintiff offered to show what occurred as to another mortgage held by the defendant "for the stated purpose of showing a custom between" the same parties "as to their dealing with mortgages similar to those in issue in this case." The master excluded the evidence subject to the plaintiff's exception. *Held*, that, it not appearing that the custom thus offered to be proved was different from that found by the master, nor what period of time the evidence referred to, the exception must be overruled.

CARROLL, J. This is a bill in equity to prevent the foreclosure of a mortgage given by the plaintiff to the defendant Barry. The plaintiff's husband was indebted to Barry and had sold to him two notes secured by mortgages of personal property, knowing that the makers were not the owners of the property described therein. At the hearing in the Superior Court the evidence was taken by a commissioner. The judge\* found that the plaintiff executed the note and mortgage described in the bill and was coerced to do so through fear of her husband's arrest, her state of mind being the result of Barry's conduct. The judge also found that while it might be questioned whether the acts of

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\* Pierce, J.

Barry amounted to a technical duress, "there can be no doubt that the influence was sinister, undue and destroyed her freedom of will."

The judge made a memorandum of his findings and by an interlocutory decree the cause was referred to a master to determine, among other things, the existing indebtedness of Webb to Barry. The master reported, and upon further hearing a decree was entered dismissing the bill.

1. The evidence shows that the note and mortgage, sought to be set aside by these proceedings, were executed on February 13, 1913, when Barry transferred to the plaintiff the two fictitious mortgages which the master has found were of no value. Barry, at the same time and as a part of the consideration for the note and mortgage in suit, assigned to Mrs. Webb several mortgages from which, according to the findings of the master, she already has received in money or its equivalent the sum of \$4,870.

These two fictitious mortgages were destroyed by the plaintiff immediately after they came into her possession. They were destroyed to prevent their use as evidence of her husband's guilt. From February, 1913, to October of the same year, during which time Mrs. Webb consulted counsel, she paid the interest on the note each month, except in the month of July, when she was summoned as trustee of the defendant. She has not returned, nor has she offered to return any of the property which passed to her at the time of the delivery of the mortgage. This bill was brought December 2, 1913.

If we assume that the threats made by Barry so influenced and overcame the mind of the plaintiff that they amounted to duress, see *Bryant v. Peck & Whipple Co.* 154 Mass. 460, even then the note and mortgage given by her were not void. They were at most voidable, and as such could be ratified and confirmed by her acquiescence and consent. *Silsbee v. Webber*, 171 Mass. 378. *Somes v. Brewer*, 2 Pick. 183. By paying the interest each month from February to October when free from all undue influence and when she had the aid of independent advice, she so clearly manifested her intention to affirm the contract that she is now bound by it.

Further, she has destroyed a part of the consideration and has made no offer to restore the remaining securities which she re-

ceived from Barry and from which she has realized the sum of \$4,870. In order to rescind or avoid the contract she must return to the defendant that which she has received from him, and failing in this, she is not entitled to relief. She cannot successfully contend that the contract is void, so as to be relieved of its obligations, and valid in order to enjoy its benefits. *DeMontague v. Bacharach*, 181 Mass. 256. *Drohan v. Lake Shore & Michigan Southern Railway*, 162 Mass. 435. *Moore v. Massachusetts Benefit Association*, 165 Mass. 517. *Morse v. Woodworth*, 155 Mass. 233. *Snow v. Alley*, 144 Mass. 546.

2. The plaintiff contends that the note and mortgage described in the bill were given to Barry because of his agreement not to prosecute her husband, and thus constituting the consideration of a contract to compound a felony, they are void. This question was not brought to the attention of the trial court, but, as the evidence is reported, we must decide it. The facts and inferences to be drawn do not satisfy us that the burden resting on the plaintiff has been sustained. We find there was no agreement to suppress a criminal proceeding; even if a crime was in fact committed, which we do not decide.

To prove this illegal agreement the plaintiff relies on a conversation with Barry over the telephone, in which he asked her to give him a mortgage on her property and in return for this he would return the spurious mortgages her husband had given to him. The plaintiff alleges that Barry said "Well, it has got to be fixed up, and right away; if not, I shall have Mr. Webb arrested and sent where he belongs," and that she replied "Mr. Barry, you would not do anything so mean as that, would you?" This conversation was denied by Barry; his stenographer corroborated him, and testified that on the day in question Mrs. Webb called for Barry and was informed he was not in. Later on the same day, Mrs. Webb was told, "Mr. Barry has been in, and I told him your message, and he said 'Any communications regarding this mortgage were to be consulted with Mr. Eldredge.'" In addition the stenographer testified that Webb, the husband, called her to the telephone some time later, and after asking her if she was alone, said, "Didn't you hear Barry say he was going to have me arrested?" Receiving a negative reply, he said, "I am going to tell my lawyer you said it."

It is doubtful whether this conversation ever took place as contended by the plaintiff. But even if her version of it is correct, it is not enough to establish an agreement to refrain from prosecuting her husband. It was at most a threat to prosecute him, and it further appears that Barry did not see the plaintiff for several weeks thereafter, when they met in a lawyer's office to execute the deed of assignment and mortgage. The settlement of Webb's indebtedness to Barry and the securing of the same, in the meantime, were in charge of their attorneys, and during all their negotiations there is nothing in the evidence to indicate any agreement or suggestion of an agreement to compound a crime.

It is true that Mr. Leahy, who represented the Webbs, testified that one reason why the note and mortgage were given was to save Webb from being accused of a crime, but there is no evidence showing any such agreement between him and Barry, or between him and any representative of Barry. Mr. Leahy no doubt supposed, as did Mrs. Webb, that Webb would not be criminally prosecuted if she signed the note and the mortgage upon her property securing it. But this mere expectation did not amount to a contract. In short, without reciting all the facts, we find that there was no contract to compound a felony or to stifle a criminal prosecution.

3. In order to determine the extent of the indebtedness existing between Webb and Barry, the master examined into the liability of Webb to Barry, arising out of the former's indorsement in blank of certain mortgage notes, and on this question the master reported, "no one of the notes in question was ever protested and that no specific demand, oral or in writing, was ever made by Barry upon Webb for payment of said notes or any of them, until the general demand for all that was due was made in December, 1912, as above set forth. I find that the course of dealing between Barry and Webb, both before and after the eight notes here in issue were indorsed . . . had been such that there was an implied waiver on the part of Webb of the necessity of demand, notice or protest as to any of said notes."

The plaintiff offered to show what occurred with reference to another mortgage held by Barry, "for the stated purpose of showing a custom between Barry and Webb as to their dealing with mortgages similar to those in issue in this case." This offer was

excluded and the plaintiff excepted. The master found what the course of dealing was between the parties. There is nothing to show how or in what way the evidence offered contradicted that already introduced, showing the practice and dealings of Webb and Barry, nor does it appear that this evidence had any tendency to show a different course of dealing. There being no sufficient offer of what the plaintiff expected to prove in conflict with the finding on this point, the record fails to show that any harm was done her by the ruling of the master excluding the testimony. *Cook v. Enterprise Transportation Co.* 197 Mass. 7, 10. *Noyes v. Meharry*, 213 Mass. 598, 600.

In addition to this it nowhere appears that the evidence excluded, bearing on the course of dealing, was not rightly excluded as being beyond the limits of time which might reasonably have been fixed by the master. See *Commonwealth v. Ryan*, 134 Mass. 223, 224. If we assume the offer of proof included several additional notes and mortgages, there was no error in excluding the evidence, for the reasons stated.

The form of the decree has not been questioned by the parties and we do not consider it. The decree is affirmed.

*So ordered.*

*J. F. Warren*, for the plaintiff.

*C. F. Eldredge*, for the defendants.

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FRANK K. LINSKOTT, trustee, vs. MARY R. TROWBRIDGE & others.

Suffolk. January 24, 1916. — May 17, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Devise and Legacy, Vested interest.*

A testator by his will gave nothing to any one who was not a near relation, gave specific legacies to his wife and to his only child, and gave the residue of his estate to trustees who, after paying certain annuities and during the lives of the wife and child, were to divide the income between them. If the child died before the wife, her share of the income was to be paid to the testator's nephews and nieces, children of his sisters and of a certain brother, equally, the issue of a deceased nephew or niece to take the parent's share by right of representation. The issue of another brother were entirely excluded from the benefits of the trust.

Upon the death of the survivor of the wife and child, the trustees were directed to retain a sum sufficient to pay the annuities and to distribute the rest of the estate "among my said nephews and nieces . . . share and share alike, the issue of any such deceased nephew or niece, taking its parent's share by right of representation," and, upon the death of the survivor of the annuitants, to pay over all sums remaining to the "same parties and in like manner." *Held*, that at the death of the testator the interest in remainder in the trust fund vested in the children then living of his sister and of the designated brother.

CARROLL, J. George Baird, in his will dated May 13, 1889, after providing for the payment of his debts and making specific legacies to his wife and daughter, gave the residue of his estate to trustees who, after paying certain annuities, were to pay one half the income to his widow and one half to his daughter during their lives. If his daughter survived his wife, the whole income was to be paid to her; if she died before the wife, her share of the income was to be paid to the testator's nephews and nieces, "children of my sisters and my brother Augustus, equally," the issue of any such nephew or niece, deceased, to take the parent's share by right of representation. The issue of his brother Daniel was excluded from receiving any share in said income.

"Upon the death of the last survivor of my said wife and daughter," the trustees were directed to retain a sum sufficient to pay the annuities and to distribute the remainder of the estate "among my said nephews and nieces, children of my said sisters and my said brother Augustus, share and share alike, the issue of any such deceased nephew or niece, taking its parent's share by right of representation."

Upon the death of the last survivor of the annuitants, the trustees were to pay over all sums remaining to the "same parties and in like manner," and it was expressly stated that none of the fund or its income should be paid to the issue of his brother Daniel.

The testator died April 25, 1891, at the age of eighty-two years. Surviving him were his wife, Ann Baird, who died February 20, 1894, his daughter, Ellen Baird, who died February 11, 1915, and nine nephews and nieces, children of his sisters, and of his brother Augustus, and one nephew, George Baird, the son of his brother Daniel. The last surviving annuitant died July 4, 1894. Three nephews, one of them the son of his brother Daniel, and one niece, died after the death of the testator and before the death of the surviving life tenant, February 11, 1915.



The trustee brings this bill,\* seeking instructions as to the distribution of the fund, some of the defendants contending that it should be distributed among those nephews and nieces of the testator, children of his sisters and of his brother Augustus, and issue of such deceased nephews and niece by right of representation, who were living on February 11, 1915, the date of the death of Ellen Baird; other respondents contending the fund should be distributed among those nephews and nieces of the said George Baird who were living on April 25, 1891, the date of the testator's death, or the legal representatives of any such nephew or niece, who may have deceased since that date.

The will provided for the testator's wife and child, his sisters, their children and the children of his brother Augustus. These beneficiaries were all alive and known to him when the will was made, and they were also alive at the time of his death. None of his estate was to go to strangers or to those who were not his near relatives. The objects of his bounty were known to him. It seems clear, from the language used and from the attendant circumstances, that the testator intended to dispose of all his estate and that he provided for its vesting at the time of his death. He did not intend that the remainder should be contingent until the happening of an event in the future, when the title was then to vest in those who until that time were doubtful and uncertain. The will speaks in clear and definite terms, none of which indicates an intention to postpone indefinitely the vesting in interest of the limitation to the nephews and nieces. On the other hand, they disclose a purpose to have a present interest pass to the defined nephews and nieces, to be enjoyed in the future after the particular estate had ceased. *Gibbens v. Gibbens*, 140 Mass. 102. *Crapo v. Price*, 190 Mass. 317, 320. *Gray v. Whittemore*, 192 Mass. 367, 378. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35. *Ware v. Minot*, 202 Mass. 512. *Southard v. Southard*, 210 Mass. 347.

The language of the will is the language of a present gift. It does not denote a gift to take effect in the future. Although the possession of the estate is limited by the occurrence of future events, the title and ownership in the clearly defined nephews and

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\* The suit was brought in the Supreme Judicial Court and was reserved by *Pierce, J.*, for determination by the full court.

nieces is ascertained and fixed as of the time of the death of the donor. If a contingent remainder were contemplated, "words of contingency, such as 'if they shall be living at her death,' or 'to such of them as shall be living,' the usual and proper phrases to constitute a condition precedent," would naturally be expected to be found in the instrument creating the estate. *Marsh v. Hoyt*, 161 Mass. 459, 461. *Wood v. Bullard*, 151 Mass. 324, 333. *Heard v. Read*, 169 Mass. 216. *Harding v. Harding*, 174 Mass. 268. *Ball v. Holland*, 189 Mass. 369. *Bryant v. Flanders*, 201 Mass. 373, 375. *White v. Underwood*, 215 Mass. 299, 301.

Three distinct conditions are provided for by the testator, namely, if his daughter died before his wife, the income to which the daughter was entitled while living is to be distributed "to and among my nephews and nieces, children of my sisters and my brother Augustus," during the lifetime of his wife; upon the death of the "last survivor of my said wife and daughter," the rest and residue of the estate, the trustees retaining a sufficient sum to pay the annuities, is to be distributed to "said nephews and nieces;" upon the death of the last survivor of the annuitants, all sums then remaining are to be paid "to the same parties and in like manner."

The "same parties" were to take on the happening of each event. It is evident the testator did not intend that one group of persons should receive on the daughter's death the income payable to her during her life, and another group of persons should be paid a portion of the principal on the death of the surviving tenant, and a still different group of persons should come into ownership of what remained upon the death of the last annuitant. If the will created contingent remainders, such results might have happened, and different parties, instead of the "same parties," would have been owners of the various interests.

Construing the will as establishing a remainder vesting from the date of the testator's death, it follows that the same set of persons then owned all the rest and residue of his estate, and such a construction is the only one we think consistent with the clearly expressed desire of the testator. *Rotch v. Rotch*, 173 Mass. 125. *Whitman v. Huefner*, 221 Mass. 265.

It is contended that since it was the design of George Baird, the testator, to exclude the issue of his brother Daniel from any share in the estate, to construe the will as vesting the remainder

in the nephews and nieces living at the time of the testator's death, might have brought about the very result which he sought to avoid. In other words, if the will be construed thus, in the event of the nephews or nieces dying intestate and without issue after the testator's death, the issue of the brother Daniel surviving them might share in the estate as next of kin of the deceased nephews and nieces. The possible contingency of the issue of his brother Daniel sharing in his estate under these circumstances, in this indirect manner, was so remote that it is doubtful if it was considered or thought of by the testator. We think the argument is of no value in ascertaining the intention of the testator.

Aside from the presumption that a vested rather than a contingent remainder is contemplated, *Bosworth v. Stockbridge*, 189 Mass. 266, *Whitman v. Huefner*, *supra*, *Blume v. Kimball*, 222 Mass. 412, we are of opinion that, considering the particular language as well as the scope and purpose of the will, it was the intention of the testator to have his entire estate vest in possession and in remainder at the time of his death.

*Decree accordingly.*

*F. K. Linscott, pro se*, stated the case.

*E. H. Fletcher*, for Harriet W. Edes.

*B. P. Gray, pro se*, as administrator of the estate of Sophronia M. Wiswall, and for Edmund T. Wiswall.

*F. M. Copeland*, (*F. W. Fisher* with him,) for the administrator of the estate of William A. Frost and for Alice A. Frost.

*J. Lowell*, (*J. A. Lowell* with him,) for Helen B. Seidensticker.

*H. S. Riley*, for Mary R. Emerson and others.

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BRIDGET E. SHEA vs. MANHATTAN LIFE INSURANCE COMPANY.

Suffolk. March 10, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Bills and Notes, Delivery. Payment. Insurance, Life. Practice, Civil, Verdict, Exceptions. Jurisdiction. Contract, Performance and breach.*

The mere facts, that an agent of a life insurance company took to a beneficiary under a policy a check payable to the beneficiary's order for the amount to which he was entitled, that the beneficiary indorsed it by signing his mark on the back

and that the agent then took it away because the beneficiary wanted cash and not a check, do not prove that the check was delivered to the beneficiary and are not conclusive evidence of payment to the beneficiary of the amount due to him.

And where, at a trial of an action by the beneficiary against the insurance company for a balance due of the amount called for by the policy, besides the facts stated above, there is evidence that the beneficiary, when he called for the money due him at the office of the company, was paid a part of what was due him and was induced to leave the remainder with the company "on call" and bearing interest, and that the agent without authority from the beneficiary invested the balance in the capital stock of another corporation, a finding of the jury for the plaintiff for the full unpaid amount of the policy is warranted.

And, because such an action is on the policy and is not to recover back the amount invested by the agent in the capital stock of another corporation, the plaintiff is not required, as a condition precedent to bringing his action, to tender back that stock, a certificate for which had been delivered to him in a sealed envelope without his knowledge.

Nor should the presiding judge instruct the jury that the plaintiff is limited in his recovery to the amount unpaid of the sum called for by the policy less the value of the stock in the other corporation.

In the present case, where the presiding judge gave the instruction just described and the jury found for the plaintiff in the full amount claimed by him without making any deduction on account of the stock of the other corporation, it was held that the defendant was not harmed by the judge's error in its favor.

CROSBY, J. This is an action of contract, to recover a balance due upon two policies of life insurance for \$1,000 each, issued by the defendant to one Phipps, the plaintiff's former husband, in which the plaintiff is named as beneficiary.

The home offices of the defendant company were in the city of New York; and there was a branch office in Boston in charge of one Mosher, who, the evidence showed, was the defendant's agent, cashier and manager, with duties fixed by the terms of his written contract of employment.

After proof of the death of the insured had been furnished to the defendant, the latter sent a check for \$2,000 to Mosher, payable to the order of the plaintiff. There was evidence that the check was given by Mosher to one Fletcher, an insurance broker (who obtained the policies in question for the insured) with instructions to take it to the plaintiff; that the plaintiff could neither read nor write; that she indorsed the check by her mark; and that it was returned by Fletcher to Mosher, who deposited it in his personal account. The plaintiff denied that she had ever seen the check or that she indorsed it.

Fletcher testified that she said she did not want a check but

that she wanted the cash, that she indorsed the check and that he told her "to come up in a few days and get the money. . . ."

On February 23, 1910, the plaintiff went to the Boston office of the defendant, accompanied by Ellen Conroy, received \$200 in cash from Mosher and gave a receipt in the following form:

"Boston, February 23, 1910.

"Received from H. G. Mosher, Manager, \$200, leaving a balance due on call of \$1800.

her

Bridget X Phipps       ———       Ellen Conroy       ———       \$200."  
mark

The plaintiff testified that on her visit to the defendant's office, when she received the payment of \$200, Mosher asked her why she did not leave the money with them, the company would pay her six per cent interest and that she could get only four per cent from the savings bank; that he told her "it will be just as safe as the bank, and we will send you your interest every three months and you can come to this office at any time and get the whole or any part of your money;" that she said "I will need \$200 of the money to pay the funeral expenses and I will leave the rest with the company."

She further testified that Mosher presented to her a paper to which she "touched a pen with which Mosher made a mark," and that at his request Mrs. Conroy witnessed her signature; that Mosher then handed her \$200 in cash and a large sealed envelope; that upon returning home she deposited the sealed envelope in a trunk; and that she had no knowledge of its contents until October, 1913, after there had been a failure in the payment of interest, when she opened the envelope and found it contained a certificate of stock in a corporation known as Investors' Corporation Company.

At the close of the evidence, the defendant requested the presiding judge \* "to direct the jury that on all the evidence the jury must find for the defendant, and further, to rule that as the plaintiff did not offer to transfer to the defendant, before bringing suit, the twenty shares of Investors Corporation Company stock she had in her possession at the time suit was commenced, she

\* *Stevens, J.*

could not recover." The presiding judge refused so to rule, and submitted the case to the jury who found for the plaintiff in the sum of \$1,800 with interest from the date of the writ. The jury, in response to special questions submitted to them, also found as follows:

That the plaintiff indorsed with her mark the defendant's check for \$2,000 knowing what it was.

That the defendant's check of \$2,000 was not given to the plaintiff in payment of the insurance on her husband's life.

That the plaintiff did not know she was receiving stock of the Investors' Corporation Company in lieu of the balance of \$1,800 cash due under her policy.

It is plain that Fletcher was the defendant's agent to deliver the check to the plaintiff, and he might have been found to have been acting within the apparent scope of his authority in procuring the plaintiff's indorsement upon the check, which he afterwards returned to Mosher, the defendant's manager; this was a fact involved in the finding of the jury. *Barry v. Mutual Life Ins. Co. of New York*, 211 Mass. 306. *Markey v. Mutual Benefit Life Ins. Co.* 103 Mass. 78.

If the check had been delivered by Fletcher to the plaintiff, doubtless it would have operated as a payment of the amount due, but the jury could have found upon the evidence that it never was delivered to the plaintiff. The only evidence upon that subject is found in the testimony of Fletcher who said that he did not know that she ever had it in her hand or possession, and in response to the question "Did you tell her the check was in payment of the policy?" replied, "Why I don't know what talk I made to her at the time." This and the other evidence warranted a finding that the check never was delivered to her, nor is such delivery to be inferred from the finding that she indorsed it knowing what it was. Such indorsement and knowledge alone did not prove a delivery to her and so cannot be regarded as conclusive evidence of payment.

If the plaintiff declined to accept the check because she desired that the amount due her should be paid in cash, as the jury could have found, and she indorsed it solely for that purpose, it never having been delivered to her, the defendant is liable, even if the proceeds were afterwards misappropriated by Mosher. It is

liable in the same way that it would be had it sent cash to Mosher to pay the claim, and the plaintiff had declined to accept the cash so sent because of the denomination of the bills, and Mosher had promised the plaintiff to have the bills changed and to pay her later but had failed to do so.

The defendant originally owed the plaintiff \$2,000. The jury in effect have found that the balance of \$1,800 never has been paid either by check or otherwise.

The defendant contended that the plaintiff invested the balance of \$1,800 in the shares of stock and received such stock in lieu of the balance due under the policies, but the jury have found against this contention. *United States Wringer Co. v. Cooney*, 214 Ill. 520.

The general verdict for the plaintiff is not inconsistent with the finding made in answer to the first special question submitted to the jury.

The contention that the plaintiff cannot maintain this action because she did not offer to transfer and deliver to the defendant the certificates of stock in the Investors' Corporation Company cannot be sustained. It is familiar doctrine that one rescinding a contract for breach of warranty or fraud and who sues to recover back the consideration, must first put the defendant *in statu quo* by returning what he has received. *Owen v. Button*, 210 Mass. 219. *O'Shea v. Vaughn*, 201 Mass. 412. *Miller v. Roberts*, 169 Mass. 134, 146. *Bartlett v. Drake*, 100 Mass. 174. This principle has no application to the facts in the case at bar. It is to be observed that this is an action of contract to recover the amount due upon the policies. The plaintiff does not seek to rescind a contract for the purchase of shares of stock. On the other hand she contends that she never entered into any such contract. In these circumstances she was under no obligation to offer to transfer the stock as a condition precedent to her right to begin the action. Besides, there is nothing to show that the defendant ever owned the stock in question or that it ever had any interest therein. We do not mean to intimate that the plaintiff is not bound to account for the stock to whoever may be entitled thereto. Her right to bring this action stands upon entirely independent grounds.

It follows that the action of the judge in directing the jury to deduct from the amount due on the policies the value of the stock, if it had any, was error; but as that instruction did not injuriously

affect the substantial rights of the defendant, it becomes immaterial. The amount of the verdict shows that no deduction was made on account of the stock.

As the rulings requested by the defendant could not properly have been given, the exceptions saved in each bill of exceptions must be overruled.

*So ordered.*

*R. Homans, (P. E. Costello with him,) for the defendant.*

*F. M. Phelan, (T. F. Quinn with him,) for the plaintiff.*



MARY A. TILDSLEY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 10, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Practice, Civil, New trial, Verdict.*

Upon a motion in writing for a new trial, on the grounds that a certain verdict was against the weight of evidence and that the damages assessed were not in accord with the evidence but contrary to the weight thereof, the trial judge indorsed the following memorandum and order: "Considering the exceedingly slight character of the direct physical injuries sustained by the plaintiff, and the greatly disproportionate and seemingly exaggerated effects of nervous shock claimed to have resulted therefrom, and the fact that this was the first cause tried by the jury, and that they necessarily lacked experience, and considering the unusual nature of the address to the jury by the counsel for the plaintiff, which well might have unduly excited their sympathy on the one hand and their prejudice on the other, I am of the opinion, and I find, that the damages assessed were not in accordance with the evidence, but contrary to the weight thereof. Defendant's motion is allowed, the verdict is set aside, and a new trial ordered." *Held*, that the verdict was set aside as a whole and that the new trial was ordered upon all the issues in the case and was not limited to the question of the amount of damages.

TORT for personal injuries sustained on December 31, 1912, when the plaintiff was a passenger on a street railway car operated by the defendant on Broadway Extension in the part of Boston called South Boston. Writ dated January 11, 1913.

In the Superior Court the case first was tried before *Stevens, J.* The jury returned a verdict for the plaintiff in the sum of \$1,750, which was set aside by the judge.



There was a second trial before *King, J.*, at which the jury returned a verdict for the plaintiff in the sum of \$1,800. The defendant made in writing the motion for a new trial which is described in the opinion and the judge indorsed thereon the order there quoted.

Thereupon there was a third trial before *Fessenden, J.* After the jury were impanelled, the plaintiff's counsel asked the judge to rule that the trial be limited to the question of the amount of damages, contending that St. 1911, c. 501, applied to the granting of the motion for a new trial by *King, J.*, and to the statement filed by him. The judge refused so to rule, and ordered that the trial proceed upon all the issues. The plaintiff excepted. At the close of all the evidence, the plaintiff's counsel asked the judge to rule as follows: "The only question for the jury is as to the amount of damages." The judge refused to make this ruling and submitted the case to the jury upon all the issues. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*J. F. Creed & J. J. Mansfield*, for the plaintiff.

*J. E. Hannigan*, for the defendant.

RUGG, C. J. This case was tried before a judge of the Superior Court sitting with a jury, where a verdict was rendered for the plaintiff. A motion to set aside the verdict was filed, alleging (1) that it was against the weight of the evidence, and (2) that "the damages assessed were not in accordance with the evidence, but contrary to the weight thereof." Upon that motion the judge made this indorsement: "Considering the exceedingly slight character of the direct physical injuries sustained by the plaintiff, and the greatly disproportionate and seemingly exaggerated effects of nervous shock claimed to have resulted therefrom, and the fact that this was the first cause tried by the jury, and that they necessarily lacked experience, and considering the unusual nature of the address to the jury by the counsel for the plaintiff, which well might have unduly excited their sympathy on the one hand and their prejudice on the other, I am of the opinion, and I find, that the damages assessed were not in accordance with the evidence, but contrary to the weight thereof. Defendant's motion is allowed, the verdict is set aside, and a new trial ordered."

The question to be decided is the meaning of this statement. Its concluding sentence, standing by itself, is unmistakable. It is a direct and complete setting aside of the verdict as a whole and directing an entirely new trial upon every issue. All that which precedes the final sentence is somewhat lacking in perspicuity. It creates confusion but does not go quite far enough to cut down the decisive conclusion reached. St. 1911, c. 501, provides that a judge in "granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted." The indorsement is a compliance with this statute. Emphasis doubtless is placed on excessive damages and the finding is that they are not in accordance with the evidence. But reference is made, also, to other matters. The character of the physical injury, said to have been slight, may have been incompatible with the manner of the accident, as testified to by the plaintiff. The inexperience of the jury in conjunction with the general verdict may have shaken the belief of the judge in its freedom from bias, misapprehension or prejudice on liability as well as on damages. *Scannell v. Boston Elevated Railway*, 208 Mass. 513.

The reference to the unusual nature of the argument in behalf of the plaintiff bears as strongly upon liability as upon any other issue. It is the plain duty of a judge presiding over a jury trial, to take note of improper arguments and counteract their effect. It is his primary obligation to see that a fair trial is had and that no unjust advantage is taken by either side. *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495. *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 514. He may in his discretion cause the objectionable conduct to cease at once. But he may deal with it in any other proper way to the end that no wrong be done. *Commonwealth v. Richmond*, 207 Mass. 240, 250.

It is provided by R. L. c. 173, § 112, that no verdict shall be "set aside as excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive." It is manifest that the judge did not intend to set aside this verdict on the ground of excessive damages, for he fixed no sum to be remitted at the election of the plaintiff.

Moreover, it is conceivable that the finding as to damages may be so violently contrary to the evidence as to taint the verdict as an entirety and require a complete new trial.

Therefore, we are brought to the conclusion that the verdict was set aside as a whole. *Edwards v. Willey*, 218 Mass. 363.

*Exceptions overruled.*

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WALTER R. KERR vs. HENRY M. WHITNEY.

Suffolk. March 14, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

*Supreme Judicial Court. Practice, Civil, Amendment. Equity Pleading and Practice, Amendment. Jurisdiction.*

St. 1905, c. 263, which repealed so much of R. L. c. 156, § 5, as gave the Supreme Judicial Court jurisdiction over certain actions in contract or replevin, did not take away the power of that court under R. L. c. 173, § 52, to allow an amendment changing a suit in equity in that court into an action at law; and under St. 1909, c. 33, and St. 1911, c. 275, the Supreme Judicial Court in allowing such an amendment either may order that an action of contract into which a suit in equity has been amended shall be removed to the Superior Court for trial or may order that after the amendment the action of contract shall be tried in the Supreme Judicial Court, as was done in the present case.

RUGG, C. J. This litigation was begun as a suit in equity in the Supreme Judicial Court for Suffolk County. A demurrer to the bill on the ground, among others, that there was a plain, adequate and complete remedy at law, was sustained. Thereupon the plaintiff, against the objection and subject to the exception of the defendant, was allowed to amend his bill into an action at law for breach of contract.\*

The allowance of this amendment was strictly within the power conferred by R. L. c. 173, § 52. It is contended that this power no longer rests with the Supreme Judicial Court by reason of St. 1905, c. 263, which repealed so much of R. L. c. 156, § 5, as conferred original jurisdiction upon that court over certain ac-

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\* By order of *Braley, J.* The order concluded as follows: "and that the bill be further amended into an action of law for damages for breach of contract. And it is further ordered, adjudged and decreed that trial of said cause of action be had at the bar of this court." At the request of the defendant the justice reported the case for determination by the full court under R. L. c. 173, § 105.

tions in contract or replevin. St. 1909, c. 33, enabled that court to order the removal of any action of contract or replevin pending before it to the Superior Court for trial. St. 1911, c. 275, amended R. L. c. 173, § 52, so as to make it permissive instead of mandatory for the court allowing an amendment from equity into law to retain jurisdiction of the cause.

The result of these statutes is to leave with the Supreme Judicial Court power to amend a cause from equity into law. The advantages of a generous jurisdiction to allow amendments changing the form of action, in order that a trial may be had upon the merits notwithstanding errors in the commencement or pleadings, are obvious. It is not unusual that in this way alone can the bar of the statute of limitations be avoided. The power has been freely exercised in order to simplify procedure, obviate delay and prevent a miscarriage of justice. *Browne v. Browne*, 215 Mass. 76. *Day v. Mills*, 213 Mass. 585 and cases cited.

It is not likely that the Legislature consciously intended to curtail this salutary power. R. L. c. 173, § 52, has not been narrowed, but on the contrary one and possibly the only manifest effect of the amendment of St. 1911, c. 275, was to enable the Supreme Judicial Court to send suits in equity amended into actions of contract or replevin to the Superior Court for trial. While the purpose of St. 1905, c. 263, was to relieve the Supreme Judicial Court of a part of its *nisi prius* work, the combined effect of the two later acts, to which allusion has been made, was not to impose upon it necessarily any of the work of which it had thus been relieved.

Moreover, amendments of the nature here in question scarcely would be allowed in instances where there was not an honest mistake or where the design was to get considered by the Supreme Judicial Court an action at law or in replevin.

*Order allowing amendment affirmed.*

*H. W. Ogden*, for the defendant.

*J. P. Jackson, Jr.*, for the plaintiff.

ISAAC SIMON vs. JUSTICES OF THE MUNICIPAL COURT OF THE  
CITY OF BOSTON.

Suffolk. March 14, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

*Poor Debtor, Examination. Arrest, On civil process. Constitutional Law.*

St. 1906, c. 203, § 1, which provides that a judgment debtor summoned for examination before a magistrate preliminary to an order for his arrest on execution shall be examined on oath upon the charges specified in the notice to him and that "such examination may be in the presence of the magistrate or otherwise as he shall order," is constitutional and is not in violation of the Declaration of Rights, arts. 1, 10, 11, 30.

When a judgment debtor appeared before a judge of a municipal court for examination under St. 1906, c. 203, at the suggestion of the counsel for the judgment creditor the judge ordered that, while the judge was in a room near or adjoining, a stenographer provided by the creditor's counsel should take a complete record of the questions and answers and should prepare a typewritten transcript thereof for each counsel, that, after these transcripts had been examined fully by the parties, such changes might be made as would make the questions and answers conform to the truth, and that then the questions and answers should be read to the judge in the presence of the debtor and should be signed and sworn to by him. *Held*, that this procedure, which was in conformity with the statute, was judicial and that the statute in authorizing it was not an encroachment by the legislative upon the judicial department of the government.

It also was *held* that this procedure conformed to established and appropriate methods of procuring and presenting evidence.

It also was *held* that the statute was a law regulating rights of property and liberty within constitutional limits.

In a case where the procedure above described was followed, the judge refused to put the stenographer under oath, and it was *held* that the refusal was proper, because the duties of the stenographer were such that there was no occasion for her being sworn.

RUGG, C. J. This is a petition for a writ of prohibition.\* The pertinent facts are that the petitioner, a judgment debtor, was

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\* The case was heard by *Braley, J.*, who was of opinion that the petitioner was not entitled to the relief sought, but, the petitioner having stated that he questioned the constitutionality of St. 1906, c. 203, § 1, under which the order complained of was made by the respondents, the justice reported the case for determination by the full court.

being examined under R. L. c. 168, § 20, as amended by St. 1906, c. 203, § 1, for the relief of poor debtors. This examination without objection was begun and had proceeded for a time in a room in the Court House in Boston adjoining or near that in which a judge of the Municipal Court of the City of Boston was engaged in other work, each question and answer being written out in long hand. Thereupon, in order to facilitate the examination and at the suggestion of the counsel for the judgment creditor, the judge ordered that a stenographer provided by such counsel should take a complete record of the questions and answers and prepare one typewritten transcript thereof for each counsel, that, after it had been fully examined by the parties, such changes might be made as would make the interrogatories and answers conform to the truth, and that then they should be read to the judge in the presence of the debtor and signed and sworn to by him.

It is not argued that this procedure was not in conformity to the statute. By its express terms the examination "may be in the presence of the magistrate or otherwise as he shall order."

The contention is that the statute is unconstitutional as contravening the Declaration of Rights, arts. 1, 10, 11, 30, which in general guarantee to every individual equality before the law, the protection of life, liberty and property according to standing laws, recourse to law for injuries to person, property and character, and the strict separation of government into the three departments of executive, legislative and judicial.

The instant statute offends against none of these constitutional rights.

The examination of an applicant for the oath for the relief of poor debtors is not a common law right. It is wholly the creature of statute, which, so far as concerns the present method, has come into existence since the adoption of the Constitution. *Stockwell v. Silloway*, 100 Mass. 287, 296. See *Commonwealth v. Badlam*, 9 Pick. 362. It is entirely for the benefit of the debtor. As to him it is a concession of grace and not the regulation of a right. The procedure within the boundaries set for the protection of fundamental rights by the Constitution is entirely within the power of the General Court. Affidavits and depositions long have been a familiar method of bringing facts before a court. *Parker v.*

*Nickerson*, 137 Mass. 487. It is only when the subject is held to answer for a crime that he has the right "to meet the witnesses against him face to face." *Fisher v. McGirr*, 1 Gray, 1, 32. Moreover, the examination of the poor debtor is not the evidence of some one else. It is the testimony of himself in his own behalf and for his own relief.

The examination under the circumstances here disclosed was in a sense in the presence of the judge. It was conducted under his general supervision. Objections as to testimony could be passed upon by him without delay. The debtor was not compelled to answer any question to which objection was made until directed by the judge. When such an examination is in writing, it is not the oral question and answer which constitutes the evidence, but the written interrogatories and answers signed and sworn to by the debtor. The writing out of the question and answer is preliminary to this final form which becomes the evidence to be considered by the court.

The procedure is judicial. It is wholly under the control of the court. Although the writing out of the questions and answers may go on outside the physical presence of the judge, the written document is signed and sworn to by the debtor in the presence of the judge. It is only when thus completed that it is ripe for consideration by the judge. It is not then hearsay evidence. The statute is not a legislative declaration that a decision may be rendered upon testimony that the judge has not heard, nor an encroachment by the legislative upon the judicial department by directing the court to base its decision upon evidence not taken or received according to recognized formalities. The procedure prescribed by the statute conforms to established and appropriate methods of procuring and presenting evidence. The statute is a standing law, which regulates within constitutional limits rights of property and liberty.

The use of the stenographer was an expeditious method in common use of reducing to writing the evidence of the debtor. The refusal by the judge to put her under oath for the faithful discharge of her duties was put upon the reasonable ground that "as the transcript of the examination was not to be binding upon either party until such additions, alterations or corrections, if any, had been made therein in order that it might be in the form

in which the parties desired that it be submitted to the court," her duties were such that there was no occasion for her being sworn.

*Petition dismissed.*

*F. G. Woodbury*, for the petitioner.

*W. F. Frederick*, for the respondents.

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ELBRIDGE NOYES *vs.* THOMAS NOYES & another, executors.

Essex. March 17, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Practice, Civil*, Exceptions, Conduct of trial, New trial on ground of mistake. *Evidence*, Opinion. *Contract*, Rescission, Performance and breach. *Damages*, In contract. *Devise and Legacy*. *Election*. *Mistake*, As ground for new trial. *Supreme Judicial Court*.

In an action, where the genuineness of the signature of a deceased person was a material issue, this court was of opinion that the testimony of a certain witness that the signature in question was genuine, which was admitted at the trial by the presiding judge, should have been excluded on the ground that the witness did not have sufficient knowledge of the signature of the decedent to qualify him as a witness on the subject, but, inasmuch as there was abundant other testimony on both sides as to the genuineness of the signature, and this witness was not of such commanding position or influence that his opinion would have unusually persuasive force with the jury, as there had been discussion in the presence of the jury in regard to the competency of this witness, as he himself had expressed a doubt as to his testimony being of value and as the judge had received it with evident reluctance and with a careful warning to the jury that the witness's lack of familiarity with unquestioned signatures of the decedent was to be considered in passing upon the weight to be given to the evidence, it was *held*, that, although the evidence was admitted improperly, the error had not affected injuriously the substantial rights of the adverse party and that therefore under St. 1913, c. 716, § 1, the exception to the admission of the evidence should be overruled.

In the same case this court overruled an exception to the admission of testimony that the signature was genuine by another witness, who had greater familiarity with the signatures of the deceased, although the court was of opinion that it would have been a wiser exercise of discretion not to permit him to testify.

In an action against the executor of the will of the plaintiff's father on an agreement in writing dated and alleged to have been executed by the plaintiff's father more than fifteen years before his death, whereby he promised to give to the plaintiff certain specific property "in consideration that he remain on the farm and manage the same for me in my old age," the defendant contended that the



plaintiff could not recover because the contract had been rescinded as matter of law. It was not disputed that the plaintiff received from his father some compensation for work on the farm all the time after the date of the contract. It appeared that a little over five years after the date of the contract the plaintiff and his father made and signed an agreement in writing as follows: "Agreement between [father and son named] for one year from [the date]. E. N. [the plaintiff] shall receive for services, carrying milk, and general farm work the sum of nine dollars per week. Specified, E. N. shall render an account of money received from milk and other farm produce once a month and also receive his payment in full for services rendered," and that at the time this agreement was signed the plaintiff gave to his father a receipt, dated back about a month and a half, as follows: "Received from J N \$200 in full for all demands to this date." The evidence was conflicting as to the circumstances which led to the making of this agreement and the giving of the receipt, and there was evidence of the defendant of circumstances and of conduct of the plaintiff tending to show a rescission of the earlier contract, which was met by evidence of the plaintiff tending to explain such circumstances and conduct. It appeared that the farm was a small one, the management of which would not take all the time of the plaintiff, who was a young man with a family. *Held*, that it was not necessarily inconsistent with the earlier contract that the plaintiff should continue to receive pay for work actually performed by him and that it could not be said that as matter of law the contract had been rescinded, the question of rescission being one of fact.

In the case above described it appeared that the father was vigorous almost up to the time of his death at the age of about eighty-nine years, that when the earlier contract with the plaintiff was made he was about seventy-two years of age, and there was evidence tending to show that the plaintiff performed such services of management as naturally would fall to his charge in view of his father's vitality and years. *Held*, that the son's readiness to carry the entire burden if the necessity for it arose and his actually doing all that his father was willing to leave to him might have been found to have been the consideration required by the contract, and that the question whether the plaintiff had performed his part of the contract by managing the farm was a question of fact.

In the case above described it appeared that the will of the plaintiff's father contained a general direction to pay all the testator's debts and that a part of the property promised to the plaintiff by the contract and also other property not included in the contract were devised specifically to the plaintiff by the will. The judge instructed the jury that the measure of damages was the difference between the value of the property described in the contract and the portion of the property so described which the plaintiff took under the will, and refused to rule that the plaintiff was entitled to recover only the difference between the value of the property described in the contract and the value of all the property devised to him by his father's will. *Held*, that there was no error in the instruction; that the plaintiff's claim for breach of contract was in the nature of a debt and that the loss suffered was the value of the property promised to him diminished only by the partial performance of that promise by the testamentary gift.

Where there is no statement in a will that a devise or legacy is in payment of a debt in whole or in part, the general rule is that the testamentary gift is to be regarded as a benefaction and not as a payment.

In the case above described there was ground for the contention that, if the plaintiff's claim was satisfied in full, the devises and legacies contained in the will of the plaintiff's father could not take effect according to the tenor of the will, and

that the plaintiff by accepting the benefits given him by the will had exercised an election to ratify its provisions. This contention was introduced by the defendants for the first time at the argument before this court. It was not raised by their answer and was not presented at the trial, nor was it presented at a previous trial of the case, and it was not within the scope of any of the general requests for rulings addressed to the presiding judge. *Held*, that the contention was not open to the defendants upon the exceptions before this court, but it was *said* that, before the entry of final judgment, the defendants had the right to move in the Superior Court for a new trial on the ground "that, by mistake of parties or counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried."

It here was *said* that it was not necessary in the present case to decide whether, in a case where it appears to be necessary to prevent a miscarriage of justice, a point not theretofore raised at any state of the proceedings may be acted on by this court to accomplish a right result in accordance with the law.

CONTRACT for the breach of an alleged agreement in writing which is printed below. Writ dated July 2, 1914.

The contract declared upon was as follows:

"December 4, 1895.

"This is to certify that I, James Noyes, do promise to give to my son Elbridge Noyes my homestead place, all of my adjoining meadow, my Knight Pasture, Highfield Pasture, all of my stock consisting of cows, horses, hogs, and all of my farming implements, carts, wagons so forth in consideration that he remain on the farm and manage the same for me in my old age if he should leave at any time this agreement shall be valid and he shall share as I may make further provisions.

"James Noyes.

"And I, Elbridge Noyes do promise to stay on the farm and comply with the above wishes and to carry out this agreement with my father, James Noyes, to the best of my ability.

"Elbridge Noyes."

In the Superior Court there was a second trial of the case before *Sanderson, J.* The evidence is described in the opinion. James Noyes died on January 1, 1913, survived by five sons, two daughters and three grandchildren, who were the issue of two deceased sons. He left real estate valued at \$10,935 and personal property valued at \$12,921.44. His will was dated July 3, 1903. The following extract from it shows the provisions for the plaintiff

and also the devise of the homestead to the testator's son James Addison Noyes, who was appointed one of the executors:

"To my son Elbridge Noyes of said Newbury two pieces of land in said Newbury known as the 'Jerry' field, and the 'Ilsly' field, containing about ten acres, these lots being bounded on the east by land of Knight, Ilsly, and Noyes; on the south by land of Rolfe and Bray; on the west by land formerly of David Little; and on the north by Hay street.

"Also one piece of marsh land off Plum Bush known as the 'Barn' lot, containing about ten acres. Also the piece of marsh land, known as the 'Smith' lot adjoining the above mentioned 'Barn' lot on the south, containing about fourteen acres.

"Also one undivided half of the 'Highfield' pasture so called in said Newbury, said half being about twenty acres.

"Also one undivided half of the cow pasture in said Newbury, on the road leading to Knight's Mill, said pasture being located near Fowle's ice house.

"Also one undivided half of the 'Bradley' meadow in the Town of Rowley, near Cedar Point said half comprising about six acres.

"I desire the appointment of my sons Thomas Noyes, and James Addison Noyes, as the Executors of this my last will, and request that they may be exempt from giving any surety or sureties on their Probate bond.

"To my son James Addison Noyes of said Newburyport, my homestead lot in said Newbury, situated on East High Street comprising about thirty acres of land with the dwelling house and all other buildings thereon, said land being bounded . . ."

Exceptions to the admission of certain testimony of the witnesses Perkins and Little are described in the opinion.

The defendants asked the judge to instruct the jury as follows:

"If the plaintiff and his father entered into the alleged agreement of 1895, the written contract which they entered into in 1901 was a rescission of the earlier contract, and the plaintiff is not entitled to recover."

The judge refused to give this instruction and the defendants excepted. The judge, under instructions appropriate and correct if the instruction requested was refused properly, submitted to the jury the question, whether upon all the evidence in the case

the parties had rescinded the agreement declared on. The defendants contended that upon all the evidence in the case they were entitled as a matter of law to the instruction requested.

An exception in relation to the measure of damages is described in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$9,354; and the defendants alleged exceptions.

*B. B. Jones, (E. Foss with him,)* for the defendants.

*R. E. Burke,* for the plaintiff.

RUGG, C. J. This is an action to recover damages for the breach of a contract in writing between the plaintiff and his father, dated December 4, 1895, whereby the latter promised to give to the plaintiff certain property "in consideration that he remain on the farm and manage the same for me in my old age." The issues raised at the trial were the genuineness of the alleged signature of the father to the contract, rescission and the measure of damages. The father was a farmer in Newbury who died testate in January, 1913, survived by five sons and two daughters, and grandchildren.

1. A neighbor named Perkins was permitted to testify that in his opinion the signature of the testator to the contract of 1895 was genuine. He testified that he had seen his signature, but not often, and had seen him write his signature "once perhaps;" that he had testified at a previous hearing that in his opinion the signature was genuine but was unable to identify the paper then before him. This was all that he would say as to his qualification. At this time no standard of the handwriting of the deceased was in evidence.

It is the general rule that opinion evidence from one having no special qualifications by experience or study is not admissible. Exceptions to this rule exist where the facts about which the witness is asked to express an opinion are such as may be comprehended by persons of ordinary capacity and cannot be reproduced and described to the jury precisely as they appeared to the witness at the time of the event. The exception is founded on practical necessity in the administration of justice, where matters as to which in the common affairs of life such expressions of opinion convey definite conceptions of actual facts, and where otherwise evidence might be difficult or impossible to obtain. The

exception comprehends a wide range of subjects. Exemplifications are found in proof of identity of persons and things, of likeness of sound, of distance, speed, weight and age, where the conclusion drawn from things seen or heard may be reasonable, accurate and reliable and yet not susceptible of being reproduced by verbal description. It was said by way of illustration in the thorough and full discussion of this general subject in *Commonwealth v. Sturtivant*, 117 Mass. 122, at page 133: "Every person is competent to express an opinion on a question of identity as applied to persons, things, animals or handwriting." It is plain, from the connection in which that sentence occurs in the opinion, that it was not intended to lay down an unvarying rule that everybody called as a witness might under all circumstances testify whether, in his opinion, a disputed signature was genuine. It presupposed that there was some recognized necessity for the admission of such testimony. Where, for instance, the point in controversy is whether a lost document was in the handwriting of a certain person, anybody familiar with that person's handwriting may testify, although he pretends to no skill in the matter. *State v. Shinborn*, 46 N. H. 497. So also, where one has considerable familiarity with the signature or handwriting of a person growing out of numerous observations, he may give his opinion even though unable to read or write. *Foye v. Patch*, 132 Mass. 105, 108.

Where undoubted standards of handwriting, as well as the questioned signature, are before the jury, there is no occasion for the testimony of one who is neither an expert nor possessed of considerable familiarity with the handwriting of the person whose signature is under examination. The opinion of the jury under such circumstances is quite as good as that of the witness of ordinary experience who has no particular acquaintance with the genuine handwriting. There is, under such circumstances, no occasion for the opinion of the outsider of only ordinary intelligence. *Whalen v. Rosnosky*, 195 Mass. 545. *Commonwealth v. Tucker*, 189 Mass. 457, 486.

It seems to us that the testimony of this witness ought not to have been admitted. But this is one of the cases where much must be left to the discretion of the presiding judge in deciding in the first instance upon the qualification of a witness. His decision

will be sustained unless it plainly appears to have been unwarranted. *Nunes v. Perry*, 113 Mass. 274, 276. The witness does not appear to have been of such commanding distinction, position or influence that his opinion would have unusually persuasive force with the jury. There was abundant other testimony on this point, from numerous witnesses on each side, as to the admissibility of which there is no contention. There was discussion in the presence of the jury upon the competency of this witness. He himself expressed doubt as to his testimony being of any value. The judge received it with evident reluctance and with careful warning that the witness' lack of familiarity with unquestioned signatures was to be considered in passing upon the weight to be given to the evidence. The case has been tried twice. In view of all these conditions, with some hesitation we are brought to the conclusion that, although the evidence was admitted improperly, that error has not injuriously affected the substantial rights of the defendants, and that therefore there ought not to be another trial on this ground. St. 1913, c. 716, § 1.

The witness Little, according to the record, had greater familiarity with the signature of the deceased than did Perkins. It would have been a wiser exercise of discretion not to permit him to testify; but the exception hardly can be sustained.

2. It is contended that as matter of law the agreement of 1895 was rescinded. That contention depends in part upon another agreement in writing, signed by the plaintiff and his father, in these words: "Newbury, Mass., February 13, 1901. Agreement between James Noyes and Elbridge Noyes for one year from January 1, 1901. Elbridge Noyes shall receive for services, carrying milk, and general farm work the sum of nine dollars per week. Specified, Elbridge Noyes shall render an account of money received from milk and other farm produce once a month and also receive his payment in full for services rendered." Contemporaneously the plaintiff gave a receipt dated back to January 1, 1901, of this tenor: "Received from James Noyes \$200 in full for all demands to this date. \$200."

The evidence was not in harmony as to the circumstances which led to the making of this agreement and the giving of the receipt. The father died on January 1, 1913. After the funeral of the father, his children gathered at his former home to hear the will read. By

its terms the homestead was given to a brother of the plaintiff and the Knight and Highfield pastures and stock and tools were given in equal shares to the plaintiff and that brother. Under the agreement of 1895 all these were promised to the plaintiff. Certain other property was given to the plaintiff by the will. The plaintiff then said nothing about his agreement of 1895, but remonstrated with a brother who expressed dissatisfaction with the will. Subsequently in a contest over the will he aided the executors. He said nothing about his agreement until April, 1914. He presented a bill against the estate for a small amount, saying nothing about the 1895 contract. These and perhaps other acts are persuasive factors in support of the contention that the agreement in suit had been rescinded. But as to all of them the plaintiff offered explanation. It was not disputed that the plaintiff received some compensation from his father for work on the farm all the time after 1895. The papers of 1901 may have been found to relate to that subject alone. Moreover, they were signed in the presence of other members of the family whom the father desired, according to some of the evidence, to keep in ignorance of the 1895 agreement. It was not inconsistent with the contract of 1895 that the plaintiff should continue to receive pay for work actually performed by him. The farm was a small one and it could not have been contemplated that its management would take all the plaintiff's time. He was a young man with a family and he would be expected to work. Subsequent stipulations as to his compensation and receipts for pay cannot be held as matter of law to abrogate the 1895 agreement. The plaintiff's conduct respecting the will and his delay in presenting his contract were said by him to be due to the fact that the contract had become mislaid and was found later between the leaves of a magazine.

Waiver or rescission of an agreement is usually a question of fact. Where various transactions are involved, where testimony is conflicting and diverse inferences may be drawn from conduct, it ordinarily cannot be ruled as matter of law that a contract has been abrogated. *Fox v. Harding*, 7 Cush. 516, 520. *O'Shea v. Vaughn*, 201 Mass. 412. *Tapley v. Thayer-Osborne Shoe Co.* 221 Mass. 166. Giving due weight to all the evidence, it cannot be said here that as matter of law there has been waiver or rescission.

3. Whether the plaintiff furnished the consideration for the

father's promise mentioned in the 1895 contract by managing the farm also was a question of fact. While the father was vigorous almost up to the time of his decease at the age of about eighty-nine, he was about seventy-two years of age at the time that contract was made. It may have been made by him in view of anticipated infirmities of old age which never were quite realized. There was testimony tending to show that the plaintiff performed such service of management as naturally would fall to his charge in view of his father's vitality and years. The son's readiness to carry the entire burden if the necessity for it arose, together with actually doing all that his father was willing to leave to him, may have been found to be the consideration required by the contract.

4. The defendants requested a ruling that the measure of damages, if the plaintiff was found entitled to recover, was the difference between the value of the property described in the contract of 1895 at the time of the testator's death and the value on the same date of the property devised to the plaintiff by the father's will, which included certain property not named in the contract. This request was refused and the jury were instructed that the measure of damages was the difference between the value of the property described in the contract and the value of that portion of the same property which the plaintiff took under the will. In this there was no error. There was a general direction in the will to pay all the testator's debts. This in effect made all the legacies conditioned upon a payment of the debts. Where there is no statement in the will that a legacy or devise is in payment of a debt in whole or in part, the general rule is that the testamentary gift is to be regarded as a benefaction and not as payment of the debt. *Smith v. Smith*, 1 Allen, 129. The plaintiff's claim for breach of contract was in the nature of a debt. The damages were the value of the property promised. The only matter in diminution of those damages was the partial performance by the testator by the gift in the will of a part of the property promised in the contract.

5. The defendants urge that they should be granted a new trial on the ground that the plaintiff, having accepted benefits under the will, is now barred from setting up a claim which will frustrate the testator's intent as expressed in other parts of the will. There



is ground for the contention that the estate of the testator is such that all other legacies and devises hardly can take effect according to the tenor of the will if the plaintiff is paid in full for his present claim. The testator by his will disposed to other persons by specific devise and bequest of some of the estate which, according to the contract of 1895, he had promised to give to the plaintiff, and to which possibly the plaintiff by seasonable suit might have secured title through specific performance. The doctrine of election in equity is well established in this Commonwealth. It was stated by Chief Justice Shaw in *Hyde v. Baldwin*, 17 Pick. 303, at page 308, in these words: "if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will, or in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent the full effect and operation of every part of the will." *Smith v. Wells*, 134 Mass. 11. *Tyler v. Wheeler*, 160 Mass. 206, 209.

There is color for the suggestion that the doctrine of election is applicable to the case at bar, although, as the case has not been tried upon that issue, it is not certain that all the material facts are now disclosed. But that contention was not presented at the trial. It was not raised by the answer. There was no request for instructions upon the point. It is introduced for the first time at the argument in this court. It is not within the scope of any general requests for rulings addressed to the trial judge.

It is not necessary now to decide whether, in cases where it appears to be necessary to prevent a miscarriage of justice, a decisive or pertinent point not theretofore raised may be acted on by this court in order to accomplish a right result in accordance with the law. *Slater v. Rawson*, 1 Met. 450. *Lyon v. Prouty*, 154 Mass. 488. *Kenerson v. Colgan*, 164 Mass. 166. *King v. Nichols*, 138 Mass. 18. *Frost v. Curtis*, 172 Mass. 401. *Grebenstein v. Stone & Webster Engineering Corp.* 205 Mass. 431. *Bond v. Bond*, 7 Allen, 1, 6. *Parrot v. Mexican Central Railway*, 207 Mass. 184. See *Hanley v. Eastern Steamship Corp.* 221 Mass. 125, 135. This is not a case for the application of such a principle. There have been two trials before a jury. Whether the failure hitherto to suggest the doctrine of election was due to mistake, oversight, strategy

of trial, a feeling that it was inconsistent with the theory of forgery of the 1895 instrument on which the defence at those trials chiefly was conducted, or to other causes, does not appear on this record.

Whether the defendants, under all the circumstances, ought to be allowed now to plead that matter and to have another chance to try the case on this new ground, depends upon factors which cannot be determined on these exceptions. That is a question to be decided by the Superior Court where the trial occurred rather than by this court.

The defendants, before the entry of final judgment in the Superior Court, have a right to move there for a new trial on the ground "that, by mistake of parties or counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried." *West v. Platt*, 124 Mass. 353. *Day v. Mills*, 213 Mass. 585, 587.

*Exceptions overruled.*

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CRANE COMPANY vs. JOHN H. PENSION & another.

Essex. March 27, 1916. — May 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Practice, Civil, Exceptions. Evidence, Competency.*

On an exception to the exclusion of a question to a witness the burden is on the excepting party to show that the answer to the question, as the judge understood the question and as he had a right to understand it, was competent.

In order to show that an assistant cashier in a shop made a certain pencil mark on a payment stamp on a bill to indicate that the acknowledgment of payment was cancelled as having been stamped on the bill by mistake, where such assistant cashier has failed to identify the pencil mark as having been made by her, it is not competent to show that she had made similar marks on other occasions, this having no tendency to show that she made the mark in question.

DE COURCY, J. The principal defendant, John H. Pension, hereinafter referred to as the defendant, was indebted to the plaintiff company for plumbing supplies to the amount of \$726.09 and on April 13, 1912, forwarded his check for \$378.98 on account

of that bill. He testified that on April 15, 1912, he went to the plaintiff's place of business, paid the balance, \$347.11, in cash to a young man who apparently was in charge of the office, and received from him a receipted bill. The plaintiff denied that it ever had received payment of this balance.

The defendant introduced in evidence a bill on which appeared a payment stamp of the plaintiff company. The assistant cashier of the company, Frances J. Mahoney, testified that this receipted stamp was "blanked out." She further testified as follows: "Q. What do you mean by saying it is blanked out? A. Why, put a line through it, — a mark to show it was cancelled. — Q. What line do you refer to? A. A lead pencil line. — Q. Written like an M? That is your writing, is it? A. Yes, to blank out the paid stamp. . . . — Q. Why did you put on the paid stamp? A. Why, I made a mistake, if I stamped it. Of course, I do not know that I have stamped it, but I have done it before. — Q. You have done it before? A. Yes, sir. — Q. That is, made mistakes before? A. Yes, I have. . . . — Q. Is there any way that you can tell definitely that this pencil mark was yours? A. No, there is not. — Q. The form of it — does that bring to your attention anything? A. I don't know what you mean. — Q. Well, is that the usual way? A. Yes. — Q. That you cross out a paid stamp when put on in error? A. Yes, sir."

Later one Slattery, the cashier of the plaintiff company, was called by it as a witness. After testifying that he now observed a pencil mark through the stamp on the receipted bill, he was asked, "Have you seen similar pencil marks on other statements, receipted in the same manner by Miss Mahoney?" On objection the trial judge \* excluded this question. The only exception in the case is that taken by the plaintiff to this exclusion.

The burden is on the plaintiff, as excepting party, to show that this question was competent, and that it was prejudiced by the exclusion of the answer thereto. There was no offer of proof, but we assume that the witness would have answered "Yes." It is now argued by the plaintiff that this testimony was admissible to show that the "M" shaped pencil mark was a symbol which the assistant cashier was accustomed to use as a cancella-

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\* *Bell, J.* The jury found for the defendants; and the plaintiff alleged exceptions.

tion mark on occasions when she affixed the payment stamp by mistake. It is apparent from the record, however, that the judge understood that this evidence was being offered, not to show the meaning of the mark or symbol when admittedly made by Miss Mahoney, but to prove that this mark on the bill in question was in fact made by her. During the examination of Miss Mahoney herself she had failed to identify the paid stamp on said bill as one made by her. She had no recollection of having put it on, and nothing in its form enabled her to identify it as her own. She added that "if she did put it on she would also put her initials upon it." When counsel then attempted to show what her custom was on other occasions with reference to marking paid stamps, he said, "It is principally for the purpose of identifying her own mark, by other marks;" and the judge stated in substance that counsel could not prove that she did it in this instance by showing that she had done it on other occasions. When excluding the question in controversy, the judge remarked, "That is what I have already excluded."

In other words, in the absence of any offer of proof and statement as to the purpose for which the question was being asked, the judge understood and had a right to understand that its purpose was to show that similar pencil marks had been made on receipted bills by Miss Mahoney on other occasions, in order that the jury might infer therefrom that she had made the mark on the receipt in controversy. The evidence was not competent for that purpose. The fact that Miss Mahoney made similar marks on some other occasions had no tendency to prove that she made the mark in question. *Hamsy v. Mudarri*, 195 Mass. 418. *Commonwealth v. Rivet*, 205 Mass. 464. She already had testified that when she made such a pencil mark over a paid stamp, she did so to indicate a cancellation.

*Exceptions overruled.*

*G. M. Poland*, for the plaintiff.

*R. L. Sisk*, for the defendants.

## STEPHEN JENNINGS vs. WILBUR F. WHITNEY &amp; others.

Suffolk. November 15, 1915. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, &amp; CARROLL, JJ.

*Lien, Equitable. Assignment, Validity. Equity Jurisdiction, To enforce equitable lien. Contract, Validity.*

An assignment by the maker of a promissory note to the payee, as security for the payment of the note, of "money to be received" by the maker upon the performance, not yet completed, of a contract between him and a third person for the manufacture of certain articles, creates, as between the parties to the assignment, an equitable lien or charge upon the contract price when earned to the amount of the note and interest.

The provisions of U. S. Rev. Sts. § 3477, declaring that all transactions and assignments of any claim upon the United States, or of any part or share thereof or interest therein, shall be absolutely null and void, do not affect the validity, as between the parties, of an assignment, as security for the payment of a promissory note, of "money to be received" by the maker of the note upon the performance by him of a contract with the United States.

Nor is the validity of such an assignment affected, as between the parties to it, by a provision in the contract with the United States "that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part [the maker of the note] shall annul the same, so far as the United States are concerned."

A Maine corporation with a usual place of business in Boston in this Commonwealth entered into a contract with the United States for the manufacture and delivery of certain navy supplies. To acquire necessary money for operating expenses, it borrowed money and gave to the lender its note secured by an assignment of "money to be received" on account of the contract. Subsequently, after it had spent \$1,700 toward performance of the contract but before it had completed it sufficiently to be paid any part of the contract price, it was adjudicated a bankrupt. Receivers, appointed by the bankruptcy court, upon their petition were ordered to sell the assets of the corporation and did so to one of the largest creditors and the sale was confirmed. No bill of sale was given and the receivers and the purchaser did not intend to give any. They knew of the assignment to secure the note. The purchaser, one of the receivers and a third party then formed a Massachusetts corporation of the same name as the bankrupt "to acquire the business formerly carried on by" the bankrupt "with . . . all . . . properties connected with the business . . . the good will . . . and the benefit of all pending contracts." The purchaser of the assets of the old corporation then transferred them, without a bill of sale, to the new corporation and it carried out the contract with the United States, spending \$2,700 more in so doing, and received in payment \$4,286. The payee of the first corporation's

note brought a bill in equity to enforce his lien upon the amount so received by the new corporation. A decree was entered for the plaintiff and, on an appeal by the defendant, it was *held*, that the lien was enforceable, and the decree was affirmed.

BILL IN EQUITY, annexed to a writ of attachment in the Superior Court dated November 18, 1913, and afterwards amended, against Wilbur F. Whitney, the Sub-Target Gun Company, a Massachusetts corporation, the Sub-Target Gun Company, a Maine corporation, and Louis L. G. de Rochemont, the trustee in bankruptcy of the Maine corporation, alleging that the plaintiff was the payee of certain notes given by the Maine corporation to him and the assignee of the proceeds of a contract between the Maine corporation and the United States government, that that corporation had been adjudicated a bankrupt and that receivers of its assets had been appointed, that a sale of rights under the contract had been made by the receivers to the defendant Whitney, who had transferred his rights to the Massachusetts corporation, and that the Massachusetts corporation had completed the contract and had received the pay therefor. The prayers of the bill were that the plaintiff be paid the amounts of his notes and interest from the proceeds of the contract in the hands of the Massachusetts corporation.

The case was heard by *Jenney, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. The judge filed a memorandum, containing the following, among other findings of fact:

For some time previous to September 16, 1912, there was in existence a corporation organized under the laws of Maine and named the Sub-Target Gun Company. On that date it entered into a contract with the United States to furnish and deliver at the naval torpedo station of the United States at Newport, Rhode Island, as the commandant of that station might direct and within ninety days from said date, numerous parts designed to be used in the construction of torpedoes for \$4,694. Time was made an essential element of the contract. The contract further provided that in case the company failed in any respect to perform the contract, the same might at the option of the United States "be declared null and void, without prejudice to the rights of the United States to recover for defaults therein or violations thereof," and that "any transfer of the contract, or of any interest therein, to

any person or party" by the company "shall annul the same so far as the United States are concerned." The company entered upon the performance of this contract.

In November, 1912, being in need of money to carry on its business, the company borrowed of the plaintiff \$1,000 and gave to him its note for that amount payable in one month and bearing interest at the rate of one per cent per month after maturity, together with an assignment of "money to be received" on account of the contract, above described, and at the same time agreed in writing that it would set apart that sum from the amount coming due to it from the United States government under the contract, and would not use nor suffer that amount to be used, but would turn it over to the plaintiff with interest in payment of the loan.

On January 7, 1913, the company, needing more money to carry on its business, borrowed of the plaintiff \$600 more, and gave to him its note and an assignment upon terms exactly similar to those included in its agreement of the previous November.

Thereafter proceedings in bankruptcy were instituted against the company and receivers were appointed by the United States District Court for the District of Massachusetts. The company then was very largely indebted and the defendant Whitney was a creditor for more than \$50,000. There was no evidence that the notes and assignments to the plaintiff were void or voidable as a preference, or that he knew or had reason to believe that the corporation was insolvent at the time when the moneys were advanced by him and the assignments received by him.

At the time of the appointment of the receivers, the company had performed a substantial amount of work under its contract and had expended in that performance approximately \$1,700, but it had not completed any of the parts provided for in the contract, and in consequence of such non-completion had not made any delivery under the contract or received any payment on account thereof.

On April 11, 1913, the receivers filed in the District Court a petition for the sale of all the property of the company "including machinery, tools, stock on hand, furniture, patents, interests in patents, contracts, etc.;" and in the petition recited that it was very essential that the property of the bankrupt be disposed of as

a "'going concern' subject to all incumbrances." On this petition, on April 28, 1913, the receivers were ordered to sell such property forthwith.

On May 5, 1913, the receivers reported to the District Court that they had sold "all the property and estate of said bankrupt subject to all liens and incumbrances," to the defendant Whitney for \$5,000 and requested that they "be authorized on receipt of the consideration in cash to complete the sale by executing the proper instruments transferring to said purchaser all the right, title and interest in said property, subject to all incumbrances." On the same day that court ordered that the sale be confirmed.

Acting under the authority thus given, the receivers sold and delivered all of the property of the company to the defendant Whitney for \$5,000 but gave him no bill of sale or other transfer in writing except assignments of contracts of the company other than that herein involved. The omission to make a formal assignment of the contract in controversy was intentional. The receivers and Whitney then knew of the existence of the assignments to the plaintiff and that the plaintiff had advanced money to the corporation.

Whitney, one of the receivers and one Danforth then caused to be organized a new corporation under the laws of Massachusetts under the name of the Sub-Target Gun Company, the Maine corporation assenting to the use of the name. The certificate of the new corporation provided, among other things, that the corporation was organized "in particular to acquire the business formerly carried on by the Sub-Target Gun Company, with the plant, machinery, stock and all other properties connected with the business, and the good-will of the business, and the benefit of all pending contracts, and the stock in trade thereof."

The property sold by the receivers to Whitney, as well as other property of Whitney, was transferred to the new corporation; but Whitney purposely omitted making any formal written or oral assignment to the new company of the contract in question with the United States.

The new company then took possession of all the property of the old company, including the parts that were in process of completion under the contract with the United States, and finished the torpedo parts substantially in accordance with the original con-



tract. As the parts were completed from time to time, they were shipped to the United States naval station at Newport and were accepted, and the new corporation was paid therefor in accordance with the terms of the original contract. The new company received from the United States under the terms of the contract \$4,266.82.

Before completing the parts, the new company sent to Newport an agent who made some arrangement, the terms of which were not in evidence, for the completion of the work required by the contract in accordance with its terms. There was no assent of the United States government, however, to any transfer of the contract to the new corporation or to the assignment to the plaintiff as collateral security.

At the time of the sale of the assets of the company to Whitney, and by Whitney to the new company, the receivers and Whitney believed that the contract had been completed to about eighty per cent of the entire work and materials required thereby, but later it was found that the cost of what had been done under the contract was approximately \$1,700. The new company paid approximately \$2,700 to complete the contracts. The new corporation, acting through its officers, had full notice of all the facts in regard to the claims of the plaintiff.

The plaintiff did not prove his claim in bankruptcy, and no dividend was paid to the creditors of the corporation.

Pending determination of the suit, the defendant Whitney died and the executors of his will were admitted to defend in his stead.

By order of the judge, a decree was entered, directing the new Sub-Target Gun Company to pay to the plaintiff the amount due to him upon his notes with costs of court, and dismissing the bill without costs against the defendants, executors of the will of Whitney, and de Rochemont, the trustee in bankruptcy of the old Sub-Target Gun Company. The new Sub-Target Gun Company appealed.

The case was argued at the bar in November, 1915, before *Rugg, C. J., Braley, De Courcy, Crosby, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

*L. L. G. de Rochemont*, for the defendant Sub-Target Gun Company.

*M. L. Fahey*, for the plaintiff.

BRALEY, J. It is settled by *Elmore v. Symonds*, 183 Mass. 321, that where the debtor merely gives his personal promise to pay his creditor from a particular fund, the fund is not chargeable with an equitable lien. See in this connection *Westall v. Wood*, 212 Mass. 540; *Old Colony Trust Co. v. Medfield & Medway Street Railway*, 215 Mass. 156, 160, 161; *Coram v. Davis*, 216 Mass. 448, 454. But in the case at bar the bankrupt corporation assigned to the plaintiff all moneys accruing under its contract with the United States to secure the payment of its promissory notes, and by the terms of the assignments an equitable lien or charge as between themselves attached to the contract price when earned in so far as might be required for repayment of the notes. *Security Bank of New York v. Callahan*, 220 Mass. 84, and cases cited.

The plaintiff's failure to give notice to the bankrupt's contractee did not affect the plaintiff's rights as against the assignor. *Kingsbury v. Burrill*, 151 Mass. 199, 203. *Richardson v. White*, 167 Mass. 58, 61. *Walton v. Horkan*, 112 Ga. 814. *Columbia Finance & Trust Co. v. First National Bank*, 116 Ky. 364. *Muir v. Schenck*, 3 Hill, 228. *Cogan v. Conover Manuf. Co.* 3 Rob. (N. J.) 809. *Barnes v. Alexander*, 232 U. S. 117, 121; 2 R. C. L. Assignments, § 30, and cases cited in notes.

Nor is the lien invalidated by U. S. Rev. Sts. § 3477, declaring that all transfers and assignments of any claim upon the United States or any part or share thereof or interest therein shall be absolutely null and void. The sole purpose of the statute was to protect the government and not the interests of the parties. *Freedman's Savings & Trust Co. v. Shepherd*, 127 U. S. 494. *Ball v. Halsell*, 161 U. S. 72, 79. *Forrest v. Price*, 7 Dick. 16, 28. *York v. Conde*, 147 N. Y. 483, 493. It was so assumed in the reasoning in *Jernegan v. Osborn*, 155 Mass. 207, 210. And the provisions in article sixth of the contract, "that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States are concerned," would not affect the validity of the assignments.

The remaining question is whether the proceeds of the contract in the possession of the defendant corporation is subject to the lien. The assignments being valid at the date of filing the peti-

tion, the receivers held whatever rights the bankrupt had in the contract subject to the lien. *Hurley v. Atcheson, Topeka & Santa Fé Railway*, 213 U. S. 126, 134. *Sexton v. Kessler*, 225 U. S. 90. U. S. St. 1898, c. 541, § 67e. The money had been lent to enable the bankrupt to go on with the contract, which had not been fully performed at the date of the bankruptcy. It appears, however, to have been an undertaking from which upon completion a very appreciable profit would be realized, and the receivers filed a petition in the bankruptcy court reciting that it was essential that the property should be sold as a "going concern" subject to all incumbrances, and asking leave to sell the machinery, tools, stock on hand, furniture, patents, interests in patents and contracts. A decree accordingly having been entered, a sale followed to the defendant Whitney, to whom the bankrupt was largely indebted as a creditor. The receivers in their report of the sale asked that, upon receipt of the consideration, they be authorized to transfer by proper instruments "all the right, title and interest in said property, subject to all incumbrances," and the order of confirmation was in accordance with the request. It is found that acting under the order they delivered the property to Whitney, "but gave him no written bill of sale or other written transfer except assignments of contracts of the company other than that herein involved." The trial judge further found that while this omission was intentional, all the parties knew of the assignments and of the indebtedness to the plaintiff, who never has proved his claim in bankruptcy.

It results from these proceedings that no property of the bankrupt remained undisposed of, nor did the receivers intend that there should be any; and Whitney by force of the decrees or orders succeeded to all the assets of the bankrupt, including the contract, with the right to complete it and receive the consideration if the assent of the government could be obtained. *C. H. Batchelder & Co. Inc. v. Batchelder*, 220 Mass. 42, 44. *Federal Trust Co. v. Bristol County Street Railway*, 222 Mass. 35.

The defendant company bearing the same corporate name as the bankrupt was thereupon organized under our laws by Whitney, with whom one of the receivers and one Danforth were joined, for the purpose "in particular to acquire the business formerly carried on by the Sub-Target Gun Company, with the plant,

machinery, stock and all other properties connected with the business, and the good will of the business, and the benefit of the pending contracts and the stock in trade thereof."

The findings of fact that the receivers and the promoters intended the new corporation should be the successor of the old company whose property was to be taken over and its business resumed and prosecuted in so far as possible as if bankruptcy had not intervened and that all the property acquired by Whitney under the orders of sale passed to the defendant company even if he designedly omitted to assign specifically the contract in question, are justified by the evidence reported.

It is clear from the answers to the interrogatories propounded by the plaintiff and from the findings that the company made no new contract with the government but went on and performed the original contract and the consideration received therefor is subject to the lien. *Westall v. Wood*, 212 Mass. 540, 544. *Gage Lumber Co. v. McEldowney*, 207 Fed. Rep. 255. *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. Rep. 940. *In re Olzendam Co.* 117 Fed. Rep. 179.

The decree should be affirmed with costs.

*Ordered accordingly.*

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CHARLES S. ENSIGN, JR., guardian, vs. JOSEPHINE FAXON.

Middlesex. January 18, 1916. — May 18, 1916.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

*Guardian. Insane Person. Probate Court, Jurisdiction, Appeal. Jurisdiction. Estoppel. Words, "A person who is aggrieved."*

Expenses incurred by the guardian of an insane person in the defence of the ward's estate against proceedings for the collection of a charge for services, instituted by an attorney retained by the ward to render services in connection with the guardianship, are proper items in the guardian's account.

The proper place for the allowance of all expenses incurred and disbursements made in the proper execution of his trust by a guardian, executor, administrator, trustee or other fiduciary appointed by a probate court is in the account of his administration to the court appointing him.

The provisions of R. L. c. 162, § 44, relating to the awarding of costs and expenses in cases which are contested before a probate court or before the supreme court

of probate do not limit the power or jurisdiction of the probate courts to allow to fiduciaries appointed by that court items of expenses and disbursements properly incurred by them in such cases, but are merely supplementary thereto.

On an appeal from a decree of a single justice of this court affirming a decree of a probate court allowing in the account of a guardian of an insane person certain items for expenses and disbursements incurred by the guardian in opposing in the probate court a successful petition of the ward to be discharged from guardianship, the report of an auditor, stating in substance that the items should be allowed because the guardian's opposition to the petition was warranted by the ward's condition, was printed in the record, but the record did not state that that report was the only evidence and no other evidence was reported. *Held*, that the decree must be affirmed because it could not be said as a matter of law that the items could not have been allowed properly.

A guardian of an insane person is not "a person who is aggrieved," within the meaning of R. L. c. 162, § 9, by a decree of the probate court discharging him from his trust as guardian because the ward no longer is insane, and therefore has no right of appeal therefrom.

It here *was intimated* that heirs presumptive of the ward might have a right of appeal from such a decree.

On an appeal from a decree of a probate court allowing in a guardian's account certain items for expenses, disbursements and services in connection with an unsuccessful appeal by the guardian from a decree discharging him from his trust on the ground that the ward no longer was insane, the reasons for appeal alleged by the ward were that the decree allowing the items was erroneous in law, that the probate court did not have jurisdiction to allow the items and that they were unwarrantable and not in the interests of the ward. A single justice of this court affirmed the decree of the probate court and the ward appealed to the full court. *Held*, that the reasons for appeal alleged by the ward were sufficient in statement to permit the consideration by this court of an objection to the items because the guardian had no right to appeal from the decree discharging him from his trust on the ground that his ward no longer was insane and because the court had no jurisdiction to consider such an appeal.

Such an objection on the part of the ward is not a collateral attack upon the jurisdiction of the appellate court, the question at the hearing on the accounts being, whether the items were for charges properly incurred, and the burden being upon the guardian to show that they were incurred lawfully in the administration of his trust.

The ward is not estopped to raise such an objection to the items in the guardian's account merely because at no time during the proceedings attending the attempted appeal of the guardian from the decrees discharging him, which were long and expensive, did the ward object that the guardian's conduct in appealing was legally unwarranted or that the court lacked jurisdiction to entertain the appeal.

RUGG, C. J. This is an appeal by one who has been under guardianship as an insane person from a decree allowing the accounts of the one who has been her guardian. The items in the account which are in controversy fall into several groups and will be treated accordingly.

1. During guardianship, the ward personally retained an attorney at law, who rendered services in connection with her guardianship. He brought first a petition in the Probate Court, see *Willard v. Lavender*, 147 Mass. 15; St. 1915, c. 151, § 6, and then an action at law for his services in this regard, both having now been disposed of finally. The guardian incurred expenses in the defence of his ward's estate against these proceedings. These are proper items for inclusion in the guardian's account. It has been found to have been his duty to protect his ward's estate by this defence.

It is contended that at least so far as concerns proceedings in the Probate Court and an appeal in the supreme court of probate, the exclusive jurisdiction to allow costs and expenses is found in R. L. c. 162, § 44,\* and that since no motion for allowance of costs or expenses was presented, and no allowance made, and the proceeding is ended, there are no means for reimbursing the guardian for his expenses. This contention proceeds upon a misconception of correct probate practice and the meaning of the statute. The proper place for the allowance of all expenses incurred and disbursements made in the proper execution of his trust by a guardian, executor, administrator, trustee, or other fiduciary appointee of a probate court is in the account of his administration in the Probate Court. Those are matters relating to the management and disposal of the *corpus* of a trust which is under the control of the Probate Court. They are probate affairs. They should be settled by the Probate Court in the exercise of its general power of supervision over receipts and disbursements of the estates of its wards. The examination and allowance of the accounts of its appointees is the particular proceeding appropriate for their adjudication.

R. L. c. 162, § 44, has no effect upon this general proposition. That statute simply gives power to the Probate Court or supreme court of probate in appropriate instances to tax costs and expenses to either party as against the other or out of the estate. It sup-

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\* Material portions of this section are as follows: "In cases which are contested before a probate court or before the supreme court of probate, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other party, or they may be awarded to either or both parties, to be paid out of the estate which is the subject of the controversy, as justice and equity may require."

plements the inherent power of those courts. In instances where costs and expenses are sought by a defeated party out of the estate, or by a victorious party against his opponent, the statute offers the only channel by which an award relating thereto can be made. But that statute in no degree narrows or impairs the general powers of a court of probate. For example, one appointed executor of a will, who is obliged to confront a contest in which he finally prevails, necessarily incurs costs in securing the attendance of witnesses and expenses in retaining counsel. In the ordinary case these need not be determined as a part of the proceedings for the proof of the will. The more appropriate proceeding in which to settle such matters is in the petition for allowance of his account. These are expenses which he has incurred in administering the estate. He ought to pay them like any other similar debt and then present them for allowance in his account. That this must be so is apparent from a brief review of the statutes. Before the enactment of St. 1884, c. 131, the courts had no power to award counsel fees in contested probate matters to be paid out of the estate or charged against the other party. *Brown v. Corey*, 134 Mass. 249. But those appointed executors who succeeded in getting the will allowed did not bear personally their expenses for counsel fees. These and other necessary disbursements were paid out of the funds of the estate and allowed upon a proper accounting. The enactment of the statute did not curtail the powers of the court in respect of its former jurisdiction, but rather extended its authority into a new field. A further reason why the Probate Court is the appropriate place for settling such matters is that the beneficiaries of the estate are entitled in general to be heard as to the reasonableness and necessity of all expenses of administration. A hearing upon the account is the only convenient occasion for their appearance.

Nothing contrary to this view was decided or intimated in *Lucas v. Morse*, 139 Mass. 59. In that case there was a petition by *cestuis que trustent* for accounting by a trustee, and later for his removal. After those proceedings were ended by final decrees, the original petitioners sought to get their expenses incurred therein paid out of the estate. Of course the petition was dismissed. That decision affords no countenance to the proposition either that a fiduciary appointee of a probate court cannot charge all

his expenses rightly incurred in the execution of his trust in the account to the court of his administration, or that that court is deprived of jurisdiction to pass upon such items. See R. L. c. 150, § 14. These items were allowed rightly in view of the findings of the auditor.

2. Another group of challenged items is for expenses and disbursements incurred by the guardian in opposing in the Probate Court the petition of the ward to be discharged from guardianship. These items were allowed by the Probate Court and by the single justice.\* The evidence is not reported. Although the auditor's report is printed in the record,† see *Davis v. Gay*, 141 Mass. 531, it nowhere is stated that this was the only foundation for the decree entered by the single justice. The decree can be reversed on this point only if as matter of law these items could not have been allowed. It cannot be said as matter of law that under no conceivable circumstances could there be ground which would justify the guardian in presenting evidence on this issue to the court of first instance. There might be a special direction or request from the judge to develop the facts or other conditions which would make such course proper. Perhaps it would be his duty in any event to present the facts to that court. These items must stand.

3. Other contested items relate to expenses and disbursements incurred by the guardian in contesting the same petition of the ward for discharge from guardianship in the Supreme Judicial Court, to which it was brought by the appeal of the guardian. The Probate Court entered "a decree discharging Mr. Ensign from his trust of guardian," because the ward was no longer insane.

A guardian of an insane ward has no right to appeal from a decree of the Probate Court discharging him from his trust as guardian on the ground that his ward is no longer insane. The

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\* *De Courcy, J.*

† The auditor was appointed by the Probate Court and found, as to these items, that they were "all objected to upon the general ground that such contest was unwarranted by the then existing mental condition of the ward. I find, however, upon all the evidence before me that Miss Faxon's mental condition at that time was by no means free from doubt; that the guardian and his legal adviser sincerely believed that her insanity still continued, and that they considered it for her best interest that the guardianship should not be terminated."



guardian is not "A person who is aggrieved" by such a decree within the meaning of those words in R. L. c. 162, § 9. It was said respecting this statute by Mr. Justice Colt in *Lawless v. Reagan*, 128 Mass. 592, 593, "In order to give a right of appeal . . . it must appear that the party appealing has some pecuniary interest, or some personal right, which is immediately or remotely affected or concluded by the decree appealed from." The guardian of an insane person fails in every respect of meeting this test as applied to a decree to the effect that his ward is sane. Manifestly he has no personal right. A quite different issue is presented when he is removed for misconduct, where his right to appeal has been recognized without question. *Perkins v. Finnegan*, 105 Mass. 501. *Gray v. Parke*, 155 Mass. 433. In such a case his reputation for discretion, capacity, sound judgment, or even honesty, may be involved. But he has no pecuniary interest in any right sense in being continued as guardian, when the Probate Court has adjudged that his ward has become sane. He is simply a trustee and can have no interest in this regard adverse to the recovery of sanity by the ward. In this respect he is like an executor of a will, who may be a competent witness to its execution. *Sears v. Dillingham*, 12 Mass. 358. *Wyman v. Symmes*, 10 Allen, 153. No person holding a position of trust can be heard in court to assert that the emoluments which may come from his continuance in the execution of the trust constitute a personal interest against the interests of those otherwise concerned in the trust. To allow such appeals would have a tendency to foster useless litigation at the expense of the trust, and to dissipate funds which ought to be conserved for the benefit of the ward.

It is not perceived that harm can come from refusal to recognize a guardian as a person aggrieved by such a decree. The Probate Court may be presumed to be impartial, and no such decree would be entered without full investigation. It may be assumed that one fair hearing always will be had on the subject. Perhaps heirs presumptive of the insane person have a right of appeal. *Robinson v. Dayton*, 190 Mass. 459. *Sullivan v. Lloyd*, 221 Mass. 108. The statute as to appointment of guardians now affords such flexibility of procedure that a mistake in declaring a guardianship ended when it ought to be continued can be corrected readily

by a new appointment without delay. St. 1909, c. 504, §§ 99, 100. St. 1911, c. 206. In respect of being a person aggrieved by such a decree, a guardian of an insane person stands on no better footing than an administrator in opposing the probate of a will of his decedent produced subsequent to his appointment. *Edwards v. Ela*, 5 Allen, 87.

The reasons for appeal were sufficient in statement to permit the consideration of this ground of objection to this group of items. One reason alleged was that the decrees were erroneous in law, another that the Probate Court did not have jurisdiction to allow these items, others that they were unwarrantable and not in the interests of the ward. While other causes for the disallowance of these items may have been in mind at that time, this does not prevent now an adjudication upon the right ground. A court should not be astute to construe narrowly the grounds for appeal when the general purpose is to protect the estate of an insane person from an expense of litigation which is unwarranted in law even though the guardian may have been actuated by correct motives and by genuine solicitude for the good of his ward.

This is not a collateral attack upon the jurisdiction of the appellate court. The question here presented is whether certain items of charge in a guardian's account ought to be allowed. The burden is on him to show that the items were incurred lawfully in the administration of his trust.

The ward is not estopped from now relying upon the point. The appellate court had no jurisdiction to consider the case except upon an appeal taken by a person aggrieved by the decree of the Probate Court. *Pattee v. Stetson*, 170 Mass. 93. It would have been proper for the ward to have raised the question whether the guardian was a person aggrieved within the meaning of R. L. c. 162, § 9. That was the wise course for her to have pursued. But her failure so to do did not confer jurisdiction upon the court. That could not be founded on consent alone. She did not invoke that jurisdiction. She simply chose at the hearing on the appeal to rely upon the merits of her contention, as she did in the Probate Court, and she prevailed upon that issue. While it is unfortunate in its practical results that the point was not raised there and thus a long and expensive unnecessary hearing avoided, the hearing on appeal was due to the legally unwarranted conduct

of the guardian in attempting to appeal, and not to that of the ward. The doctrine of estoppel is hardly applicable to the ward under these circumstances.

*Decree accordingly.*

C. M. Bruce, for the appellant.

G. M. Poland, (L. P. Jordan with him,) for the appellee.



JOHN BOGNI & others vs. GIOVANNI PEROTTI & others.

Suffolk. January 19, 1916. — May 18, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Constitutional Law. Labor. Labor Union. Equity Jurisdiction.*

The right to work is property and one cannot be deprived of it by legislative enactment, it being protected by the Fourteenth Amendment to the Constitution of the United States and by the guaranties contained in the Massachusetts Declaration of Rights.

The provisions contained in St. 1914, c. 778, § 2, declaring that "in construing this act" the right to labor and to make and modify contracts to work "shall be held and construed to be a personal and not a property right," and prohibiting the granting of an injunction to enforce such a right "where no irreparable damage is about to be committed upon the property or property right of either" the employee or the employer, are unconstitutional and void.

St. 1914, c. 778, which provides in substance that the property right to labor for any individual or number of individuals associated together shall not be recognized in equity as property when assailed by a labor combination, unless irreparable damage is about to be committed upon property or a property right as there defined, would, if enforceable, deprive those employed in labor of "the equal protection of the laws" guaranteed by the Fourteenth Amendment of the Constitution of the United States and by the equivalent provisions contained in our Declaration of Rights.

The power of courts to afford relief by injunction cannot be impaired by the Legislature in such a way as to prevent its use in favor of one property owner when it is preserved for the benefit of other property owners.

This court, having held St. 1914, c. 778, to be unconstitutional on the grounds stated above, found it unnecessary to consider whether it also was unconstitutional by reason of the preference attempted to be conferred upon combinations of laborers.

RUGG, C. J. This is a contest between two labor unions seeking similar employment as laborers in the building trades. The plaintiffs are members of the General Laborers Industrial Union

No. 324, a voluntary unincorporated association, which is a branch of the national organization known as the Industrial Workers of the World.' The defendants are members of the Hod Carriers, Building and Common Laborers Union, Local 209, a like association, affiliated with a national organization known as the American Federation of Labor. The plaintiffs in their bill allege that there have been, are now and will be numerous buildings under construction in Boston and its vicinity, in connection with which they have been, are now and will be engaged and ready to offer their services in profitable, useful and pleasant employment, and that they all have no means of supporting themselves except through such employment; that the defendants, well aware of the plaintiffs' conditions in respect of such employment, have conspired to deprive the plaintiffs of their employment and have threatened that, if they did not desert their own organization and cease to be members thereof and join the organization of the defendants, the latter would cause them to be discharged from their employment, and that the defendants have used unlawful pressure upon and have intimidated certain owners of property by threats of sympathetic strikes and otherwise not to employ the plaintiffs and in some instances by these means have caused the discharge of the plaintiffs from employment.

The conduct thus described plainly was calculated to harm the rights of the plaintiffs. Under general principles of the common law, which now have become well settled, the plaintiffs' bill sets out a wrong against their rights committed by the defendants, for which ordinarily relief would be afforded in equity by injunction, *Plant v. Woods*, 176 Mass. 492, *Pickett v. Walsh*, 192 Mass. 572, *De Minico v. Craig*, 207 Mass. 593, *Hanson v. Innis*, 211 Mass. 301, *Folsom v. Lewis*, 208 Mass. 336, *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, 203, as well as at law, *Berry v. Donovan*, 188 Mass. 353.

But the defendants justify their conduct as legal under St. 1914, c. 778.\*

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\* That statute is as follows:

"An Act to make lawful certain agreements between employees and laborers, and to limit the issuing of injunctions in certain cases.

"Section 1. It shall not be unlawful for persons employed or seeking employment to enter into any arrangements, agreements or combinations with

The words of § 2 declare unmistakably that the right to labor and to make and to modify contracts to work shall no longer be a property right, so far as that question arises "in construing this act." These last four words are not a limitation upon the broad enactment that the right to labor and to contract respecting labor shall not be property, for the reason that the right to work, if it cannot be protected as are other rights of property, ceases to have the attributes of other property in all their fullness and ceases to that extent to be property. A declaration of a right coupled with a prohibition against its protection by ordinary means renders the right a vain and insubstantial shadow.

That the right to work is property cannot be regarded longer an open question. It was held in *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, at page 560, that "The right to labor and to its protection from unlawful interference is a constitutional as well as a common law right." It was said in *State*

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the view of lessening the hours of labor or of increasing their wages or bettering their condition; and no restraining order or injunction shall be granted by any court of the Commonwealth or by any judge thereof in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, or involving or growing out of a dispute concerning terms or conditions of employment, or any act or acts done in pursuance thereof, unless such order or injunction be necessary to prevent irreparable injury to property or to a property right of the party making the application, for which there is no adequate remedy at law; and such property or property right shall be particularly described in the application, which shall be sworn to by the applicant or by his agent or attorney.

"Section 2. In construing this act, the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation with any person in any place, or to do work and labor as an employee, shall be held and construed to be a personal and not a property right. In all cases involving the violation of the contract of employment either by the employee or employer where no irreparable damage is about to be committed upon the property or property right of either, no injunction shall be granted but the parties shall be left to their remedy at law.

"Section 3. No persons who are employed or seeking employment or other labor shall be indicted, prosecuted or tried in any court of the Commonwealth for entering into any arrangement, agreement, or combination between themselves as such employees or laborers, made with a view of lessening the number of hours of labor or increasing their wages or bettering their condition, or for any act done in pursuance thereof, unless such act is in itself unlawful."

v. *Stewart*, 59 Vt. 273, 289, "The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property." In the *Slaughter-House cases*, 16 Wall. 36, 127, in the dissenting opinion of Mr. Justice Swayne, but respecting a subject as to which there was no controversy, occur these words: "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty." It was settled that the right to labor and to make contracts to work is a property right by *Adair v. United States*, 208 U. S. 161, 173-175, and *Coppage v. Kansas*, 236 U. S. 1, 10. Controversy on that subject before this court must be regarded as put at rest by these decisions. The right to work, therefore, is property. One cannot be deprived of it by simple mandate of the Legislature. It is protected by the Fourteenth Amendment to the Constitution of the United States and by numerous guaranties of our Constitution. It is as much property as the more obvious forms of goods and merchandise, stocks and bonds. That it may be also a part of the liberty of the citizen does not affect its character as property. It was said in *Coppage v. Kansas*, 236 U. S. 1, at page 14, "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

No discussion is required to show that it is beyond the power of the Legislature, under constitutions which guard the individual against being deprived of property without due process of law, to declare without any process at all that a well recognized kind of property shall no longer be property. "Lawful property cannot be confiscated" under the guise of a statute. *Durgin v. Minot*, 203 Mass. 26, 28. When legislative attempts to compel the deprivation of certain comparatively small sums of money without due process of law invariably fail, see for example, *Northern Pacific Railway v. North Dakota*, 236 U. S. 585; *Great Northern Railway v. Minnesota*, 238 U. S. 340; *Chicago, Milwaukee & St.*

*Paul Railroad v. Wisconsin*, 238 U. S. 491; *Louisville & Nashville Railroad v. Central Stock Yards Co.* 212 U. S. 132, it is manifest that something recognized as property by the law of the land cannot be extinguished utterly.

A further effect of the present statute is to deprive the plaintiffs of the equal protection of the laws. The statute provides in substance that the property right to labor of any individual or number of individuals associated together shall not be recognized in equity as property when assailed by a labor combination, unless irreparable damage is about to be committed upon property or a property right as there defined and that no relief by injunction shall be granted save in like cases for which there is no relief at law. That a man cannot resort to equity respecting his property right to work in the ordinary case simply because he is a laboring man, and that he cannot have the benefit of an injunction when such remedies are open freely to owners of other kinds of property, needs scarcely more than a statement to demonstrate that such man is not guarded in his property rights under the law to the same extent as others.

If a laborer must stand helpless in a court while others there receive protection respecting the same general subject which is denied to him, it cannot be said with a due regard to the meaning of constitutional guaranties that he is afforded "the equal protection of the laws" within the Fourteenth Amendment to the Constitution of the United States and similar provisions of our own Constitution. The right to make contracts to earn money by labor is at least as essential to the laborer as is any property right to other members of society. If as much protection is not given by the laws to this property, which often may be the owner's only substantial asset, as is given other kinds of property, the laborer stands on a plane inferior to that of other property owners. Absolute equality before the law is a fundamental principle of our own Constitution. To the extent that the laborer is not given the same security to his property by the law that is granted to the landowner or capitalist, to that extent discrimination is exercised against him. It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. The courts must be open to all upon the same terms. No

obstacles can be thrown in the way of some which are not interposed in the path of others. Recourse to the law by all alike, without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law. The constitutional principles are discussed in *Opinions of the Justices*, 211 Mass. 618; 220 Mass. 627; 207 Mass. 601; 207 Mass. 606, 611, *Smith v. Texas*, 233 U. S. 630, *Atchison, Topeka & Santa Fe Railway v. Vosburg*, 238 U. S. 56, *Gulf, California, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150, *Chicago, Milwaukee & St. Paul Railway v. Polt*, 232 U. S. 165, *St. Louis, Iron Mountain & Southern Railway v. Wynne*, 224 U. S. 354.

Doubtless the Legislature may make many classifications in laws which regulate conduct and to some extent restrict freedom. So long as these have some rational connection with what may be thought to be the public health, safety or morals, or in a restricted sense, "so as not to include everything that might be enacted on grounds of mere expediency," the public welfare, they offend no constitutional provision. *Commonwealth v. Strauss*, 191 Mass. 545, 550. Weekly payment laws, employers' liability acts, workmen's compensation acts, inspection laws based on the number of employees, and numerous statutes similar in principle have been upheld. See *Commonwealth v. Libbey*, 216 Mass. 356; *Young v. Duncan*, 218 Mass. 346, 353; *Booth v. Indiana*, 237 U. S. 391; and *Tanner v. Little*, 240 U. S. 369, where many cases are collected. But all these and like statutes are quite different from one declaring that the laboring man either alone or in association with his fellows shall, as to his property right to work, be put on a footing of inferiority as compared with owners of other kinds of property when he appears in court respecting that property right. It is primary and fundamental in any correct conception of justice that the laboring man stands on a level equal with all others before the courts. Whatever may be his social or economic condition outside, when he enters the court the law can permit no rule to fetter him in the prosecution of his claims or the preservation of his rights which does not apply equally to all others respecting the same kinds of claims and rights.

It has been argued that since the equitable jurisdiction of the court is largely statutory, *Parker v. Simpson*, 180 Mass. 334, 350, it may be curtailed by the Legislature in respect of the power to



grant injunctions. It is one thing to affect the scope of equity by extending or restricting the branches of that jurisprudence which courts may administer; it is a quite different matter to enact that some citizens may resort to it while others may not.

Without discussing other aspects of this proposition, it is enough to say that the power of courts to afford injunctive relief cannot be impaired by the Legislature in such a way as to prevent its use in favor of one property owner, when it is preserved for the benefit of other property owners. It is an elementary principle of equity that an injunction never is issued except to prevent irreparable injury. If the statute means anything more than this, there would be other difficulties about its construction which need not now be elaborated.

Associations of laborers, to accomplish lawful objects by legal means, have been recognized and protected in this Commonwealth, at least since the decision of *Commonwealth v. Hunt*, 4 Met. 111, in 1842, now nearly seventy-five years ago. But it is not necessary to consider whether the preference attempted to be conferred upon combinations of laborers by the act means anything more than that, and, if it does, whether it comes within the condemnation of the principles expounded at length in *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, where statutes designed to secure to members of labor unions immunity from discharge on that ground were held to violate the Federal Constitution. See, further, *State v. Julow*, 129 Mo. 163; *State v. Kreutzberg*, 114 Wis. 530; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495; *Lewis v. Board of Education of Detroit*, 139 Mich. 306.

It has been urged, also, that, the plaintiffs being laborers and the statute having been passed for the benefit of laborers, the plaintiffs as such are not in a position to question its constitutionality. Reliance is placed on cases like *Standard Stock Food Co. v. Wright*, 225 U. S. 540, where plaintiffs who have suffered no harm by reason of the provisions of a statute have been precluded from challenging its validity. The plaintiffs by their bill set forth a plain wrong done to themselves by the defendants. The invasion of their constitutional right is direct and substantial. They have an indubitable standing to raise the constitutionality of a statute which shelters such conduct.

Recognizing every presumption in favor of the validity of statutes enacted by the Legislature, we are all of opinion that the instant statute cannot be sustained. The demurrer \* which is based on it should be overruled.

*Decree reversed.*

*T. G. Connolly*, for the plaintiffs, submitted a brief.

*F. W. Mansfield*, (*J. A. Donovan* with him,) for the defendants.



IDA BENNETT, administratrix, *vs.* THOMAS F. TIGHE & others.

Suffolk. March 7, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Attorney at Law. Assignment. Contract, Validity. Champerty. Interest.*

Where a client, who is unable to provide funds for the payment of the expenses of the prosecution of a suit against a third person, before the suit is brought assigns to an attorney at law, to secure payment to him for his legal services, all his interest in and to the claim, and there is no agreement that the attorney should not be paid for his services if he was unsuccessful in prosecuting the action, the assignment is not champertous and is valid.

Where, by the provisions of such an assignment, it is clear that the whole amount of the claim was intended to be assigned, the assignee is entitled to receive accumulated interest as incidental to the right to receive the principal sum.

CROSBY, J. This is a suit in equity brought by the plaintiff, Bennett, and by Robert J. Fawcett and Robert Fawcett, intervening petitioners, as judgment creditors of the defendant, Thomas F. Tighe, to reach and apply to the payment of their claims the interest of Thomas F. Tighe in a judgment recovered by him and others in an action against the Maryland Casualty Company, the exceptions of the defendant in that case having been overruled by this court. *Tighe v. Maryland Casualty Co.* 218 Mass. 463.

On August 17, 1910, and before the recovery by these plaintiffs, respectively, of their judgments against Thomas F. Tighe, the

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\* The demurrer was argued before *Wait*, J., who made an order sustaining the demurrer, and later, it appearing that the plaintiffs did not ask to amend the material allegations of their bill, made a final decree dismissing the bill. The defendants appealed.

latter and his co-plaintiffs had by a written instrument assigned \* all their interest in their claim against the Casualty Company to Daniel H. Coakley and James P. Magenis, and afterwards Coakley and Magenis assigned and conveyed all the interest which they received by virtue of the assignment to one David Stoneman. The amount of the judgment recovered by Tighe and others against the Maryland Casualty Company has been paid into the Superior Court by the defendant in that action, and is to be paid to the person or persons found to be entitled thereto by decree of court in this case. Stoneman has appeared and filed a claim for the whole amount of the fund by virtue of the assignments above referred to. The plaintiffs contend that the assignment to Coakley is a champertous agreement, and therefore void.

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\* This assignment was as follows:

"Whereas Matthew Adler, a minor of Boston, County of Suffolk and Commonwealth of Massachusetts, recovered judgment against Thomas F. Tighe, James B. Tighe, Edward Tighe and Patrick H. Tighe, co-partners, doing business in said Boston under the name and style of Thomas F. Tighe & Sons, in an action of tort, for the sum of" \$4,943.75; "and whereas execution was issued out of the Superior Court for the County of Suffolk and Commonwealth of Massachusetts, on the 7th day of December, A.D. 1909, for said sum of \$4,943.75; and whereas the Maryland Casualty Company, a corporation duly organized by law, and doing business in said Boston, has refused to indemnify us under its policy of insurance to the extent of the amount of said execution; and whereas we have made claim against said Casualty Company to the amount of said execution; and said Casualty Company has defaulted in the performance of its obligation under said policy of insurance; and whereas we have been compelled to borrow the amount of said execution in order to meet the demands of same, and now purpose to recover back from said Casualty Company the amount we have raised, to wit, the sum of \$4,943.75.

"Therefore, in pursuance of our intention to recover said amount from said Casualty Company, and in consideration of Daniel H. Coakley, Esq., of Boston aforesaid, undertaking to prosecute said claim against said Casualty Company to final judgment, we hereby sell, assign, and transfer over to said Daniel H. Coakley out of said judgment to be recovered, the sum of one thousand dollars now due and becoming due to us, to have and to hold the same to the said Daniel H. Coakley, with power to collect the same in our names and as our attorney hereunto duly authorized, and with power to collect in our names the balance of said sum of" \$4,943.75, "which balance we hereinafter dispose of.

"And further, in consideration of the sum of one dollar and other considerations this day paid to us by James P. Magenis, of said Boston, as he is

A judge of the Superior Court by whom the suit was heard,\* found that "the said Tighes carried a policy of liability insurance issued by the Maryland Casualty Company, which the said Casualty Company refused to pay. It was deemed necessary in order to sue said Company, to provide in some way for paying the Adler judgment. To accomplish this, and also in order to pay Coakley for his services in prosecuting the suit, the Tighes, who had no money for the purposes, made the assignment in question. The assignment was made for a valuable consideration, and transferred to the assignees all of the said Tighes' interest in and to their claim against the Casualty Company. Coakley, who was duly authorized by Magenis, assigned all their interest in said assignment to the claimant Stoneman for a valuable consideration. Coakley took the assignment as security for his services. These services he rendered successfully, and the amount charged therefor was reasonable. There was no evidence of any agreement that said Coakley should not be paid for his services if he was unsuccessful in prosecuting this suit. Both Coakley and Thomas F. Tighe testified, and neither was asked any question relative to such an agreement. I rule and find that under the circumstances stated, the assignment did not constitute a champertous agreement, and is valid and binding. The fund paid into court exceeded the amount of \$4,943.75 by reason of interest which had accumulated on said amount."

In view of these findings upon evidence which is not reported, we are unable to say that they were not warranted. The assignment to Coakley was of a portion of the judgment to be recovered, the sum of \$1,000, the balance of the judgment by the terms of the agreement being assigned to Magenis.

The judge having found that there was no evidence of any agreement between the Tighes and the attorney for Matthew Adler, aforesaid, we hereby sell, assign, and transfer to said James P. Magenis all of the balance of said sum of \$4,943.75, to wit, the sum of \$3,943.75, together with accrued costs whatever they may be, due and becoming due to us from said Maryland Casualty Company in a suit of law to be commenced by us; and to have and to hold the same unto the said James P. Magenis, with power to collect the same in our names and as our attorney hereunto duly authorized."

Here followed the in testimonium clause and the signatures and seals of the Tighes.

\* *Morton, J.*

ment that Coakley should not be paid for his services if he was unsuccessful in prosecuting the action, it was not a champertous contract and is to be distinguished from that considered by this court in *Gargano v. Pope*, 184 Mass. 571. The finding that the assignment was executed to secure the payment to Coakley for legal services did not of itself make it illegal. As was said in the case of *Blaisdell v. Ahern*, 144 Mass. 393, at page 395, "Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous." *Hadlock v. Brooks*, 178 Mass. 425. *Delval v. Gagnon*, 213 Mass. 203.

The remaining question is whether the assignment includes the interest which has accumulated on the judgment. By the terms of the agreement, the whole amount of the claim was intended to be assigned. The assignee is entitled to receive the accumulated interest, as incidental to the right to the principal sum, in the absence of anything to show that the parties intended a different disposition as to interest. Besides the judge has expressly ruled and found that the assignment was intended "to cover the amount of the final judgment against the Maryland Casualty Company, principal and interest, and was not limited to the exact amount stated in the assignment."

What has been said disposes of all the questions raised. The entry must be

*Exceptions overruled.*

*F. Hunt*, for the plaintiff.

*J. G. Walsh*, for the claimant.

## ROBERT W. HILL &amp; others vs. JOHN F. MOORS &amp; others.

Essex. March 8, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, &amp; CROSBY, JJ.

*Equity Jurisdiction*, Ratification of acts of trustee, Bill for instructions. *Trust Jurisdiction*. *Equity Pleading and Practice*, Appeal.

A suit in equity cannot be maintained by a trustee to establish the validity of the titles to certain parcels of real estate conveyed by him to various persons who are not parties to the suit, and to have the deeds which he gave as trustee and his acts as trustee ratified and confirmed.

A trustee cannot maintain a bill in equity for instructions upon a question relating to the past administration of his trust.

The consent of the parties to a suit in equity cannot confer jurisdiction of the subject matter of the suit upon the court, where it otherwise does not exist.

The question, whether a court has jurisdiction to entertain a suit in equity, will be considered by the court on its own motion although it was not raised by any party to the suit.

CROSBY, J. This is a suit in equity brought by the plaintiffs as trustees of the Salem Rebuilding Trust against certain persons described as members of the Salem Fire Relief Committee and the Attorney General of the Commonwealth.

The matters to which this proceeding relates arise on account of the great fire in Salem, which occurred in June, 1914. Immediately after the fire, committees were organized and large sums of money were promptly raised by voluntary subscription from a large number of people for the relief of the sufferers. The Legislature of the Commonwealth appropriated \$100,000 for the same purpose, and \$200,000 were appropriated by Congress for emergency relief. The total amount raised, including about \$630,000 obtained by the voluntary subscriptions, amounted approximately to \$1,000,000.

The suit was referred to a master who found that "two committees were promptly formed by the Governor, one for the purpose of raising funds, and the other for the purpose of dispensing the same." The money, in most instances, was contributed without any limitation being imposed by the donors upon its expenditure. The defendant, John F. Moors, was chairman of the committee

in charge of the disbursement of the funds. Several sub-committees were constituted, including a rebuilding committee which was organized for the purpose of aiding worthy individuals in the rebuilding of their homes, and the sum of \$100,000 was appropriated by the Salem Relief Committee for that purpose. It was voted by the committee "That the Rebuilding Committee be authorized and requested to organize a voluntary real estate trust or corporation, as they deem best, for the purpose of conducting the work for which they were appointed." In compliance with this vote the Salem Rebuilding Trust was organized. The plaintiffs were constituted the trustees thereof, and the sum of \$100,000 was paid over to them by the relief committee. The trustees thereupon executed a declaration of trust which was duly recorded in the registry of deeds and recited in detail the purposes for which the amount received and any other contributions were to be held and expended.

The bill alleges that the plaintiffs, as trustees of the Salem Rebuilding Trust, acting in conformity with the terms of the declaration of trust, have "administered the said trust fund of \$100,000, first — encouraging the building of homes by persons burnt out in the fire, designed for wage-earners, by loaning sums of money on second mortgages, in excess of amounts obtained from savings banks on first mortgages; and, second, by the purchase of land and the construction thereon of modern houses at minimum cost, either to rent at very reasonable rates, or to sell such houses to persons whose homes were destroyed by the fire." The prayer of the bill is, "In order that there may be no question as to validity of titles of real estate already conveyed to and by the plaintiffs as said trustees of the Salem Rebuilding Trust and of such other titles as may be hereafter conveyed to and by themselves and their successors as such trustees, the plaintiffs do now respectfully pray that this honorable court will ratify and confirm the said transfer of \$100,000, from the Salem Fire Relief Committee to the plaintiffs, the said declaration of trust and the acts of the plaintiffs under the terms thereof, and to declare the same to be hereafter in all respects as valid as if the same had been originally approved by this honorable court."

This is not a suit in equity brought by trustees who seek instructions as to their duties, but having fully discharged the obli-

gations imposed upon them by the trust in the manner set forth in the bill and found by the master, they ask this court to ratify and confirm the transfer of the \$100,000 from the Fire Relief Committee to them, and to declare valid the acts performed by them under the declaration of trust.

There can be no doubt of the general authority of a court of chancery to assume jurisdiction of cases in which trustees seek the instruction and desire the protection of the court in the performance of their duties. In cases of doubt as to what the law is and what their conduct ought to be under it, they are entitled to instruction and direction from the court. The authority of a trustee, however, to ask a court of equity for instructions as to his duties has always been confined to somewhat definite limits.

It was said in *Bullard v. Attorney General*, 153 Mass. 249, at page 250, "The principal requisites for a bill for instructions have often been said to be the possession of a fiduciary fund of which some disposition is necessarily to be made presently; conflicting claims, or the probability thereof; and the existence of no other means of determining rights or demands so as to protect a trustee from the risks of future liability or controversy."

It has accordingly been held by this court that trustees under a will are not entitled to instructions as to the management of a trust concerning a fund which has not come into the hands or possession of the trustees, nor with reference to questions relating to the administration of a trust where the trustees were authorized to exercise their discretion with reference thereto. *Proctor v. Heyer*, 122 Mass. 525. The right of a petitioner to instructions is confined to the discharge of his present duties; therefore, where the rights of persons in the trust estate are contingent upon the happening of events which have not occurred, instructions will not be given. *Hall v. Cogswell*, 183 Mass. 521.

Unless a petitioner for instructions has real and serious doubts as to his duty, and the advice of the court is required for his protection and the discharge of his trust, the court is without jurisdiction to entertain such a petition. The right to instructions does not extend to the determination of questions which do not require any action by the trustee, or which should properly be submitted to some other tribunal, or where events which must control the rights of the parties and the duties of the trustee have not tran-



spired. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393. *Bullard v. Chandler*, 149 Mass. 532. *Bullard v. Attorney General*, *supra*. *Austin v. Bailey*, 163 Mass. 270. *Hall v. Cogswell*, *supra*. A trustee cannot maintain a bill in equity for instructions upon a question relating to the past administration of his trust. *Sohier v. Burr*, 127 Mass. 221.

Applying these well settled principles to the case at bar, it is plain that this court is without jurisdiction to entertain the bill. The plaintiffs do not seek the instructions of this court as to their duties in the administration of the trust, but allege in substance that they have fully performed their obligations thereunder and ask that the action taken by them be ratified and confirmed. One of the objects sought to be accomplished by the bill is to establish the validity of the titles to real estate conveyed to and by the plaintiffs as trustees, by procuring from this court a decree declaring valid the transfer to the petitioners and the application of the \$100,000. The origin of this fund does not appear on the record and hence could not be passed on. It is manifest, for the reasons already stated, that the bill cannot be maintained for that purpose; besides, it is apparent that many parcels of real estate, the title to which would be involved, are owned by different persons who are not parties to the bill.

Although no question of jurisdiction has been raised by the defendants and they have appeared and answered to the merits, still it is the duty of the court to consider the question of its own motion; even the consent of the parties cannot confer jurisdiction.

In conformity with a rule of practice well established and constantly adhered to, it is the duty of the court, under such circumstances, to dismiss the action. *National Fertilizer Co. v. Fall River Five Cents Savings Bank*, 196 Mass. 458, 462. *Weil v. Boston Elevated Railway*, 216 Mass. 545, 549.

It follows that the decree \* must be reversed and a decree entered dismissing the bill.

*So ordered.*

*E. J. Carney*, for the defendants.

*A. P. White*, for the plaintiffs.

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\* This decree, entered by order of *Pierce, J.*, "ordered, adjudged, and decreed that the . . . report [of the master] be confirmed, and that the transfer of the sum of \$100,000 by the Salem Fire Relief Committee to the

## ALICE WRIGHT vs. JOHN B. LYONS.

Suffolk. March 9, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, &amp; PIERCE, JJ.

*Garage. License. Equity Jurisdiction.* To enjoin private nuisance. *Joint Tenants and Tenants in Common. Notice. Boston, Street commissioners.*

Under St. 1913, c. 577, as amended by St. 1914, c. 119, regulating the erection and maintenance of garages in the city of Boston, which requires that a petition to the board of street commissioners for a permit to erect and maintain a garage shall "contain the names and addresses of every owner of record of each parcel of land abutting thereon," and that before the license is granted notice shall be given by registered mail "to every owner of record of each parcel of land abutting on the parcel" of land on which the building is sought to be erected, such a notice must be mailed to each one of a number of tenants in common owning an abutting parcel of land.

The giving of the notice required by St. 1913, c. 577, as amended by St. 1914, c. 119, is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant a permit to erect and maintain a garage in that city so far as the rights of those entitled to notice are affected.

A suit in equity may be maintained to enjoin the erection and maintenance of a garage in the city of Boston on land adjoining that of the plaintiff without lawful authority under St. 1913, c. 577, as amended by St. 1914, c. 119, upon showing special damage suffered by the plaintiff by reason of noise, confusion, noisome odors and the storing of large quantities of inflammable and explosive material, although by the acts complained of a public nuisance also was created.

RUGG, C. J. This is a suit in equity to restrain the defendant from erecting a garage in Boston. The bill alleges that the plaintiff, a resident of Boston, with her two sisters, who live outside the Commonwealth, are owners as tenants in common of premises abutting upon those of the defendant on Warrington Street in Boston; that in July, 1915, the defendant filed a petition with the street commissioners of Boston for a permit to erect a public garage and for a license to keep, store and sell five hundred gallons

plaintiffs as trustees of the Salem Rebuilding Trust be ratified and confirmed, that the declaration of trust executed by the plaintiffs . . . be amended . . . [in certain particulars] . . .; that said declaration of trust as thus amended and the acts of the plaintiffs as trustees under the terms thereof be ratified and confirmed, and be and remain in all respects as valid as if the same had been originally approved by this court."

of gasoline in an underground tank upon his estate, upon which petition the defendant was ordered to give notice by publication and by sending "by prepaid registered mail a copy to every owner of record of each parcel of land abutting on the parcel of land on which" the defendant proposed to erect and maintain his garage; that no notice was given to the plaintiff, who did not know of the publication of the notice, and that she never has had an opportunity to object to the granting of the license, and that the erection of the garage on the defendant's premises and the exercise of the rights conferred by the license constitute a nuisance to the plaintiff's property and depreciate its value by reason of being a source of much noise, confusion and distasteful odors. The defendant's demurrer to the bill was sustained; and the plaintiff's appeal from the final decree \* dismissing the bill brings the case here.

The act under which the street commissioners undertook to proceed is St. 1913, c. 577, regulating the erection and maintenance of garages in the city of Boston, as amended by St. 1914, c. 119. The statute requires a petition for a permit, such as that averred by the plaintiff's bill to have been asked for by the defendant, to "contain the names and addresses of every owner of record of each parcel of land abutting thereon," and that before the license is granted notice shall be given by registered mail "to every owner of record of each parcel of land abutting on the parcel" on which the building is sought to be erected.

The words of the statute make it mandatory that where there are tenants in common of an abutting estate, each one must be notified. Only by giving them this meaning can effect be given to all the words used. It is the natural as well as the accurate signification of the language employed. Otherwise, as illustrated by the averments of the present bill, the only one of several owners in common in a position to be present at a hearing may have no knowledge whatever of the proceeding until after the permit has been granted.

This defect in the service of the order goes to the jurisdiction of the board of street commissioners, so far as concerns the plaintiff. No order can be passed affecting the rights intended to be secured to the plaintiff, as one of the owners of record of an abut-

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\* Made by *Wail, J.*

ting parcel of land, without notice to her in the manner required by the statute or otherwise acquiring jurisdiction by proper service upon her. *Lawrence v. Smith*, 201 Mass. 214. *Simon v. Southern Railway*, 236 U. S. 115, 122. The general notice by publication manifestly is not intended to affect her in view of the fact that another provision requires notice to her by registered mail.

The facts set out in the plaintiff's bill show a special damage to her. Even though a public nuisance is created, one suffering special damage may have a private remedy. *Wesson v. Washburn Iron Co.* 13 Allen, 95, 102 to 104. The noise, confusion and noisome odors and the storing of large quantities of inflammable and explosive material might be found to constitute a private nuisance, *Commonwealth v. Kidder*, 107 Mass. 188, 192, *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 223, *Storer v. Downey*, 215 Mass. 273, and to entitle her to relief in equity. *Stevens v. Rockport Granite Co.* 216 Mass. 486, and cases there collected. The case at bar is quite distinguishable from cases like *Henry v. Newburyport*, 149 Mass. 582, and *Shaw v. Boston & Albany Railroad*, 159 Mass. 597, for reasons set forth at length in *Wesson v. Washburn Iron Co.* 13 Allen, 95.

*Decree reversed.*

*J. H. Kenney*, for the plaintiff.

*J. H. Devlin, Jr.*, for the defendant.

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#### IN THE MATTER OF SAMUEL CARVER.

Suffolk. March 10, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Attorney at Law. Disbarment Proceedings*, Exceptions, Appeal. *Practice, Civil*, Disbarment proceedings. *Rules of Court*.

If the respondent in proceedings for the disbarment of an attorney at law, who at the hearing on the petition made no requests for rulings and took no exceptions, sixteen days after an order by the trial judge disbaring him procures an extension of time for the filing of a bill of exceptions and then within the extended time files a bill of exceptions in which for the first time he claims an exception

to the findings and order of the judge, Rule 45 of the Superior Court requires that the bill shall be disallowed.

Under Rule 44 of the Superior Court, a clerk of the Superior Court must decline to enter an appeal by a respondent from an order entered in disbarment proceedings if the appeal is not presented within twenty days after the order is made.

No exception lies, at the hearing of a motion for a new trial, to a ruling upon a question which was or might have been raised at the trial.

The Superior Court, both under R. L. c. 165, § 44, and inherently, has power to remove an attorney at law from his office, not only because of misconduct directly connected with his official duties, but also for such criminal or gross wrongdoing as makes manifest his unfitness to exercise the duties of his office.

In the present case, it was *held* to have been proper to order the disbarment of an attorney where it appeared that he had undertaken, as counsel and advisor of a man and his wife, to invest their money in mortgages on real estate, that mortgage notes amounting to \$3,200 given for the money were fictitious and that none of them was secured by a mortgage, that the attorney fraudulently had converted to his own use the money so entrusted to him and had given the notes for the purpose of deceiving the man and his wife, that a check which he later gave them was dishonored and that a large part of the money remained unpaid at the time of the hearing.

The respondent in disbarment proceedings has no right to a trial by jury.

DE COURCY, J. The Bar Association of the City of Boston on January 29, 1915, filed in the Superior Court a petition alleging misconduct on the part of the respondent, an attorney at law, and asking for his disbarment. A hearing was had before a judge of that court \* on June 21 and 22, at which the respondent was represented by counsel, and testified as a witness. No exceptions were taken, and no requests for rulings were made, during the trial or at its conclusion.† On July 1, 1915, the judge filed a memorandum of findings of fact and made an order of disbarment.

1. The substitute bill of exceptions filed January 19, 1916, and the one originally filed August 12, 1915,‡ should have been disallowed. "No exception shall be allowed by the presiding jus-

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\* *Fessenden, J.*

† The substitute bill of exceptions filed on January 19, 1916, contained the following statement: "No exceptions or requests for rulings were made during the trial or thereafter, except the respondent's bill of exceptions was filed on August 12, 1915, in which the respondent prays that his exception herein stated to the final findings and decision of the court may be allowed."

‡ The time for the filing of the bill of exceptions was extended by the court on July 17, 1915, to August 12.

tice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given." Rule 45 of the Superior Court. R. L. c. 173, § 106. *Graves v. Hicks*, 194 Mass. 524.

2. An appeal from the order of disbarment was presented for filing on November 17, 1915. The clerk properly declined to enter it, as the time allowed for filing an appeal had long expired. Rule 44 of the Superior Court.

3. A motion for a new trial was filed October 18, 1915, and was denied on January 19, 1916. On February 10, 1916, the respondent presented for filing an appeal therefrom. As this was not within the time allowed by Rule 44, it was not entered, and is not before us. And see *Boston Bar Association v. Scott*, 209 Mass. 200, 204.

Exceptions also were filed on February 1, 1916, based on the refusal by the judge of certain rulings requested by the respondent at the hearing on his motion for a new trial. Under our system a question of law that was, or that might have been, raised at the trial, cannot be raised upon a motion to grant a new trial. The exceptions "upon a motion for a new trial" provided for by R. L. c. 173, § 106, are to rulings on questions arising for the first time at the hearing on that motion. *Loveland v. Rand*, 200 Mass. 142. As we construe the certificate of the trial judge he did not allow the exceptions, but merely certified that the bill of exceptions truthfully set out the facts, if as matter of law the respondent was entitled to exceptions.

4. The respondent filed a motion in arrest of judgment \* October 18, 1915, more than three months after the order of disbarment was made. Aside from the fact that it was filed too late (see *Dean v. Ross*, 178 Mass. 397) his claim of appeal from the denial of the motion was not presented within the time allowed, and was not entered; and further, there is no merit in the point

\* The grounds of this motion were that "(1) there is no legal and authorized decision upon the evidence of which the respondent has had notice or any legal or authorized finding upon which to base an order for a Judgment upon which to base and enter a Judgment; (2) that it is unauthorized and unlawful to file or enter an order for a Judgment, until at least 3 full legal days have elapsed and especially from the same time as the decision or finding; (3) and because the respondent has had no hearing upon what the Judgment should be."

sought to be raised by the bill of exceptions filed thereon. See R. L. c. 173, § 118.

Even assuming that the evidence and findings of fact were properly before us, we are of opinion that the order of disbarment was justified, and that the respondent has not been deprived of his legal rights in the proceedings. The judge found that the respondent undertook, as counsel and advisor of William Blum and Phoebe Blum, to invest their money in mortgages on real estate in Boston; that the mortgage notes purporting to be made by Edgar H. Anderson, Charles A. Foster and Samuel Jacobs, amounting in all to \$3,200 were fictitious, and that none of them was secured by mortgage; that the respondent fraudulently converted to his own use the money so entrusted to him, and gave the notes for the purpose of deceiving and defrauding said William and Phoebe Blum; that a check which he later gave them was dishonored; and that a large part of the money remained unpaid at the time of the hearing.

An attorney is an officer of the court, exercising a privilege or franchise during good behavior. The court has power, not only under R. L. c. 165, § 44, but inherently, to suspend or remove him from his office as an attorney in the courts upon good cause shown and after proper judicial proceedings. Ordinarily the cause is misconduct directly connected with his official duties; but it may be such criminal or gross wrongdoing as makes manifest his unfitness to exercise the duties of his office. The proceedings were properly instituted by the bar association; the respondent was specifically informed of the misconduct of which he was accused; he was represented by able counsel at the trial; the charges were established after a full and fair hearing, in which he participated without making any objection thereto; and he was not entitled to a trial by jury. *Ex parte Wall*, 107 U. S. 265. *Randall, petitioner*, 11 Allen, 473. *O'Connell, petitioner*, 174 Mass. 253. *Boston Bar Association v. Greenhood*, 168 Mass. 169. *Boston Bar Association v. Casey*, 213 Mass. 549. Ann. Cas. 1913 D 1162, note.

The exceptions and appeals are dismissed, and the order of disbarment is to stand.

*So ordered.*

The case was submitted on briefs.

*S. Carver, pro se.*

*G. D. Burrage, for the petitioner.*

## DANIEL L. SMITH vs. JOHN B. LLOYD &amp; others.

Suffolk. March 14, 15, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, DE COURCY, &amp; CROSBY, JJ.

*Equity Pleading and Practice, Master's report. Attorney at Law.*

Where by an interlocutory decree a suit in equity has been referred to a master "to find the facts and to report the same to the court," the duty of the master is performed by a statement of his conclusions with such narration of the facts as may be necessary to enable the court to comprehend the steps by which his conclusions have been reached and to decide whether they are correct in law.

Under such a rule to the master he is required to report evidence only so far as is necessary to present intelligibly and fairly any question of law raised before him at the hearing.

Under such a rule the master is not required to report all the evidence even by a request to rule that one of the parties is not entitled to prevail on all the evidence.

Where, under such a rule, after the master has submitted his draft report, requests for rulings or exceptions raise questions whether certain findings are supported by the evidence, this does not require as a matter of right that the master should report substantial parts of the evidence.

The intention and effect of the rule to the master quoted above is to leave to his final determination the decision of all matters of fact.

A motion to recommit the report of a master made under such a rule for further findings and the report of parts of the evidence is addressed to the discretion of the trial judge, and ordinarily such a motion is not granted in the absence of some special reason.

It here was *said*, that it is difficult to conceive of any matter more purely a question of fact than the fair value of the services of an attorney at law.

RUGG, C. J. This is a suit in equity whereby the plaintiff, who is an attorney at law, seeks to establish a debt against the principal defendant for services rendered and to reach and apply in payment thereof property of the principal defendant in the hands of the other defendants. An interlocutory decree was entered sending the case to a master "to find the facts and to report the same to the court." An elaborate and comprehensive report has been made covering the issues raised by the pleadings in conformity to this decree. It contains no report of the evidence. On the coming in of the master's report the plaintiff moved that the case be



recommitted to the master for further findings and the report of parts of the evidence.\*

The terms of reference of a suit in equity to a master rest in each instance in the sound judicial discretion of the court. The master is not bound to report all the evidence unless required to do so by the order of reference. Without such requirement it is irregular to report the evidence at the request of either party. The duty of a master, whose rule directs him to find and report the facts in issue, is performed by a statement of his conclusions only, together with such narration of the facts as may be essential in order to enable the court to comprehend the steps by which his conclusions have been reached, and to decide whether they are correct. These principles long have been established. *Nichols v. Ela*, 124 Mass. 333, 336. *Parker v. Nickerson*, 137 Mass. 487, 490, 491. It is the duty of a master to report evidence so far as necessary to present intelligibly and fairly any question of law raised before him at the hearing. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37. But this does not mean that all the evidence can be required to be reported under a reference like the present, even by a request to rule that either party is not entitled to prevail on all the evidence. *Young v. Winkley*, 191 Mass. 570, 575. *Marra v. Bigelow*, 180 Mass. 48. *New York Bank Note Co. v. Kidder Press Manuf. Co.* 192 Mass. 391, 405. Nor does it mean that after the draft report has been submitted and parties know the decision of the master, then requests or exceptions relative to the point whether certain findings are supported by the evidence may as matter of right render necessary the report of substantial parts of the evidence.

So far as questions of law are raised during the progress of the hearing, then enough evidence must be included in the report to enable an intelligent review to be made of the correctness of the ruling, so far as it was necessary to make a ruling, as, for example, in the admission or exclusion of evidence. But the form of the pres-

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\* The suit was brought in the Supreme Judicial Court. The case was heard by *Braley, J.*, who was of opinion that a decree should be entered denying the motion to recommit, overruling all of the plaintiff's exceptions to the master's report that had not been waived and ordering that the bill be dismissed with costs; but at the request of the plaintiff he reported the case for determination by the full court.

ent rule was designed and had the effect to leave to the final determination of the master the decision of all matters of fact. *Warfield v. Adams*, 215 Mass. 506, 511. The master's report conformed to these principles.

The motion to recommit the report was addressed to the discretion of the court. Ordinarily such a motion is not granted in the absence of some special reason. *Henderson v. Foster*, 182 Mass. 447. *Duffy v. Hogan*, 203 Mass. 397, 402. *Crosier v. Kellogg*, 210 Mass. 181. *Cook v. Scheffreen*, 215 Mass. 444, 448. *Stevens v. Rockport Granite Co.* 216 Mass. 486, 494. The only question open is whether there was an abuse of discretion in denying the motion. There is nothing to indicate any exceptional reason for recommitting the report. It is not necessary to review the reasons alleged in the motion. The findings of the master were all direct and positive upon the essential facts and in no sense speculative or conjectural. The findings requested by the plaintiff were plainly irrelevant to the issues. Those objected to by him are not scandalous or impertinent.

None of the exceptions to the master's report ought to be sustained. Merely to blacken the reputation of others did not support the plaintiff's claim. The master's report shows a careful analysis of the character of the plaintiff's services to the defendant and the circumstances under which they were rendered. Whether the plaintiff was the efficient cause of bringing about the result of the removal of the guardianship, the termination of the trust and the escape of the defendant from the debasing conditions under which he lived,\* all were pure questions of fact as to which the report discloses a painstaking consideration of pertinent facts and a clear conclusion. The relations of the defendant with Miss Sullivan† and the circumstances of their intimacy, and the plaintiff's position respecting that affair, bore upon the issue of the plaintiff's services and the causes which dominated the conduct of the principal defendant and its effect upon the final result. It is difficult to conceive of any matter more purely a question of fact than the fair value of the services of an attorney.‡

\* The principal defendant had been under guardianship as a spendthrift.

† See *Sullivan v. Lloyd*, 221 Mass. 108.

‡ The bill alleged that the plaintiff's services were reasonably worth \$50,000, that the principal defendant had paid the plaintiff on account of such services \$14,450 and that there was due to the plaintiff a balance of \$35,550.

A master is not required to state every subsidiary circumstance which brings his mind to its ultimate determination as to the facts.

The appearance of witnesses while testifying is always an important element in weighing the value of testimony.

It is not necessary to go through the exceptions one by one. The principles which have been stated make it plain that they all must be overruled. A final decree is to be entered denying the motion to recommit the master's report, overruling all the exceptions to and confirming the master's report, and dismissing the bill with costs.

*So ordered.*

*W. B. Grant*, for the plaintiff.

*J. J. Kaplan*, for the defendants.

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DANA L. FULLER & others vs. MAYOR OF MEDFORD & another.

Middlesex. March 17, 1916.—May 18, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

*Medford. Municipal Corporations*, General meetings, Officers and agents, Order of aldermen.

Section 7 of St. 1903, c. 345, the charter of the city of Medford, as amended by St. 1906, c. 252, § 1, is as follows: "General meetings of the inhabitants of the city may from time to time be held, according to the right secured to the people by the Constitution of the Commonwealth; and such meetings may, and upon the request in writing of fifty qualified voters setting forth the purposes thereof shall, be called by the board of aldermen. The board, upon request in writing of twenty-five per cent of the qualified voters, shall order placed upon the official ballot for a municipal election any question of public interest set forth in such request, provided that such question can be answered by 'Yes' or 'No.'" *Held*, that the vote provided for by the last part of this section is merely advisory and that such a vote cannot take away or suspend any powers of the board of aldermen of that city.

Accordingly a petition signed by twenty-five per cent of the qualified voters of that city presented to the board of aldermen requesting that there be placed on the official ballot at the next municipal election to be held in about eleven months from that time the questions, whether a city hall should be built and, if to be built, whether it should be built under the supervision of three or more citizens, does not take away or suspend the power of the board of aldermen of that city to pass an order for the construction of a city hall; and a subsequent vote by the

voters of the city at the next municipal election not to borrow or appropriate money for a city hall has no binding effect on the city.

In such a case, a bill in equity under R. L. c. 25, § 100, by ten taxable inhabitants of the city of Medford to restrain the mayor and city treasurer of that city from borrowing money to construct a city hall will be dismissed, as here was ordered. Section 16 of St. 1903, c. 345, the charter of the city of Medford, provides that any order of the board of aldermen may be passed through all its stages at one session by unanimous consent of the members of the board present, and that, should one member or more object, action on the measure shall be postponed for at least one week. An order to construct a city hall accompanied by a letter from the mayor was presented to the board of aldermen of that city at a regular meeting and was referred to a committee. The committee unanimously recommended the adoption of the order by a report which was presented to the board of aldermen at a meeting held two weeks later. Its adoption was moved and, after discussion, the order was adopted on a roll call by the votes of sixteen members in the affirmative and three in the negative. *Held*, that the order was not passed through all its stages at one session, as its presentation at the meeting when it was referred to a committee was its first reading and constituted one stage, so that its passage two weeks later was upon its second stage, and that therefore it was not necessary to consider whether a negative vote was equivalent to an objection.

RUGG, C. J. This is a bill in equity under R. L. c. 25, § 100, by ten taxpayers of the city of Medford,\* to restrain the mayor and city treasurer of that city from borrowing money to construct a city hall in accordance with an order of the board of aldermen dated January 25, 1916. The main contention is that the order authorizing the action sought to be enjoined is invalid because the voters of the city at the municipal election in 1913 voted not to borrow or appropriate money for a city hall, which vote has not been revoked or amended.

This contention is founded on § 7 of the city charter of Medford. St. 1903, c. 345, as amended by St. 1906, c. 252, § 1.† That section contains two sentences referring to two different matters.

\* The case was heard by *Loring, J.*, who ruled that the bill should be dismissed, but at the request of the defendants in order that the matter might be adjudicated speedily, reserved the case for determination by the full court.

† That section is as follows: "General meetings of the inhabitants of the city may from time to time be held, according to the right secured to the people by the Constitution of the Commonwealth; and such meetings may, and upon the request in writing of fifty qualified voters setting forth the purposes thereof shall, be called by the board of aldermen. The board, upon request in writing of twenty-five per cent of the qualified voters, shall order placed upon the official ballot for a municipal election any question of public interest set forth in such request, provided that such question can be answered by 'Yes' or 'No.'"

The first relates to general meetings of citizens. It provides for the exercise of the right secured by art. 19 of the Declaration of Rights. It is a provision almost universally found in city charters. *Wheelock v. Lowell*, 196 Mass. 220, 226. The purpose of that sentence in general is to enable the voters to have full and free discussion and consultation upon the merits of candidates for public office and of measures proposed in the public interests. Its importance in this respect is of the highest moment. See *Commonwealth v. Porter*, 1 Gray, 476. It never has been suggested, so far as we are aware, that the vote of such a meeting had a legally binding force upon the city. It certainly can have no bearing upon its financial obligations. The second sentence of § 7 relates to the general subject of ascertaining the view of such voters as choose thus to express themselves upon any question of public interest which can be answered by a plain affirmative or negative. Its collocation with the other sentence in one section is some indication that it is of the same general character. It is in the briefest possible phrase and contains no words expressive of the effect of such vote. The force to be given it rests entirely upon implication. The natural inference is that its force and effect is the same as that of the other form of expression of public opinion with which it stands combined in one section, which is a provision long known in legislation and whose force and effect are well understood. It hardly can be presumed, in the absence of a definite enactment to that end, that the Legislature intended such a vote to bind the city absolutely and to fix finally the municipal policy upon the subject of the vote.

The conception of the referendum as to definite measures of local administration in cities is a comparatively new one in the legislation of this State. While it has been the legislative practice for a long time to make the taking effect of a statute of local concern in a particular municipality dependent upon acceptance in some form, *Barnes v. Chicopee*, 213 Mass. 1, 4, it is only within recent years that what are popularly known as the initiative and referendum have been applied in matters involving policy as to particular measures of improvement. *Graham v. Roberts*, 200 Mass. 152. It is hardly to be inferred that so radical a departure in municipal government would have been undertaken in any city without plain words indicative of that purpose.

It may well have been thought that the machinery for the expression of an advisory opinion by the voters of a city at a public meeting was quite inadequate, in view of the inconvenience of gathering at a single hall a substantial proportion of the citizens, and that this should be supplemented by giving to any voter the privilege of expressing his view so that it would be counted. Advisory expressions of public opinion participated in by large numbers of people may have been deemed likely to be a sufficiently strong incentive to action by city officers. It is no idle form to secure a definite conception in this form of what the people think on any subject of general interest. Ample scope thus is given for the operation of the language of the section without stretching it to include that which, when intended, commonly is expressed by clear words.

When the Legislature has designed to give binding force to an initiative or referendum vote, it has been able to find expression for that purpose in unmistakable words. See, for example, the city charters referred to in the footnote, where provisions in this respect are clear.\*

The conclusion seems to us inevitable that the effect of the referendum vote of the voters of Medford in 1913 had no more than an advisory effect and did not prevent the board of aldermen from dealing with the subject as it deemed wise at any time.

Shortly before the order in question was passed by the board of aldermen, a petition signed by twenty-five per cent of the qualified voters of the city was presented to the board, requesting that there be placed on the official ballot at the municipal election for 1916 the questions whether a city hall should be built and whether, if to be built, it should be built under the supervision of three or more citizens. What has been said disposes in substance of the contention that the filing of this petition operated to stay the right of the board of aldermen to pass the order until after such election. It cannot have been the intent of the Legislature to

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\* St. 1908, c. 611, §§ 27, 28, 29, Gloucester. St. 1908, c. 574, §§ 42, 43, Haverhill. St. 1910, c. 602, Part I, §§ 64, 65, Lynn. St. 1911, c. 621, Part I, §§ 45, 53, Lawrence. St. 1911, c. 680, Part I, §§ 54, 55, Chelsea. St. 1911, c. 645, §§ 60, 61, Lowell. St. 1914, c. 680, §§ 25, 26, Attleborough. St. 1914, c. 609, §§ 28, 29, Westfield. St. 1911, c. 732, Part III, § 55, Pittsfield. St. 1911, c. 531, § 69, Cambridge. St. 1915, c. 267, Part I, § 42, General Act.

suspend all power of the municipality to act touching a matter to be voted on at the municipal election, then almost eleven months in the future, when the vote itself would be simply advisory and not compulsory in its effect. When the Legislature has intended that the filing of a petition for a referendum should have the effect of suspending the power of the municipal government to act in regard to the matter referred until after the popular vote, it has disclosed that intent by plain words. This is manifested by language used in the city charters referred to in the last footnote.

The city charter of Medford provides in § 16 \* that an order of the board of aldermen may be passed through all its stages at one session by unanimous consent, but, if one member objects, the measure shall be postponed for at least one week. The single justice has found that "no one objected to the consideration of the passage of the order referred to." The record of the board of aldermen shows the order first was presented as accompanying a letter of the mayor on January 11, 1916. It then was referred to a committee. The committee unanimously recommended the adoption of the order by a report presented to the board of aldermen on January 25, 1916. Its adoption then was moved, and after discussion by several members it was adopted on a roll call by the votes of sixteen members in the affirmative to three in the negative. The order was not passed through all its stages at one meeting. It was or should have been read, and was referred to a committee at the meeting of January 11. In legislative bodies where several readings are required, and in the absence of special rule, that constitutes one stage or the first reading. The presentation at the meeting of January 25 was its second stage. Since the rules of the board of aldermen of Medford do not prescribe several readings of orders like this, that was its final stage. Therefore, even if it be assumed, but without so intimating, that a negative

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\* The whole of that section is as follows: "Any ordinance, order or resolution of the board of aldermen may be passed through all its stages of legislation at one session by unanimous consent of the members of the board present. Should one member or more object action on the measure shall be postponed for at least one week; and if when it is next considered five or more members object to its passage a second postponement for at least one week shall take place."

vote was equivalent to an objection, the order was at its final stage on January 25, 1916, having received its first consideration at the earlier meeting, and the objection of three members was not enough to require further postponement.

*Bill dismissed without costs.*

*E. E. Elder, (F. W. McGowan with him,) for the plaintiffs.*

*G. C. Scott, (C. S. Baxter with him,) for the defendants.*

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BOSTON LOAN COMPANY vs. COMMONWEALTH.

Suffolk. March 27, 1916. — May 18, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Tax, Excise on domestic business corporation. Corporation, Excise on franchise.*

*Pledge, Pledgee deemed owner for purposes of taxation. Words, "Merchandise."*

For the purposes of the interpretation of the tax act, pledged property, tangible as well as intangible, is deemed to be owned by the one in possession, whether this is a domestic or a foreign corporation or a natural person.

Under St. 1909, c. 490, Part III, § 43, the tax commissioner when ascertaining, for the purpose of imposing the excise authorized by the statute, the value of the corporate franchise of a domestic corporation engaged in the business of lending money at interest secured by pledges of articles of personal property of which it holds possession while the general title to the articles is in its customers, in computing the maximum limit of twenty per cent of the value of the things named in the statute must include under the word "merchandise" the articles of personal property thus held in pledge.

RUGG, C. J. This is a petition under St. 1909, c. 490, Part III, § 70, for the recovery of a corporation excise tax paid by the petitioner and alleged to be excessive.\* The petitioner, incorporated under the laws of this Commonwealth, carried on the business of lending money at interest, secured by pledges of articles of personal property, possession of which is in the petitioner but the title to which is in customers. No notes or other paper evidence of the loan are taken by the petitioner. The only question presented is whether the tax commissioner followed

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\* At the request of the parties the case was reserved by Loring J., for determination by the full court.



the correct rule in estimating the value of the petitioner's corporate franchise. The decision of that question depends upon the interpretation of § 43 of Part III of the tax act, St. 1909, c. 490, the pertinent parts of which are in the footnote.\* More narrowly stated, the point in controversy is whether in determining the maximum limit of taxation established by that section, the word "merchandise" includes or excludes the articles of personal property held in pledge by the petitioner.

The petitioner does not and could not well contend that these articles are not "merchandise" within the meaning of that word, which in this connection as respects chattels includes "tangible property which may be the subject of sale." *New England & Savannah Steamship Co. v. Commonwealth*, 195 Mass. 385, 391. But it does contend that the value of this merchandise ought not to be considered as a part of the principal upon which the twenty per cent is to be calculated in ascertaining the maximum excise tax. That contention is founded on the fact that the petitioner is not the absolute owner of such merchandise.

Plainly the general title to the articles pledged is in the owner. But the petitioner as pledgee acquired a special property in the article pledged. *Thompson v. Dolliver*, 132 Mass. 103. *Harding v. Eldridge*, 186 Mass. 39, 42. *Gamson v. Pritchard*, 210 Mass. 296. Ordinarily the general owner is subject to taxation for intangible personal property rather than the pledgee having a special lien. *Waltham Bank v. Waltham*, 10 Met. 334. *Chase v. Boston*, 193 Mass. 522, 527. As to tangible personal property, a different rule is established by statute. It is provided by Part I, § 26, of the tax act as amended by St. 1914, c. 198, § 2, that "Personal property

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\* "Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid; . . . but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation."

mortgaged or pledged shall for the purpose of taxation be deemed the property of the party in possession thereof on the first day of April." The natural construction of these words is that in the administration of the tax laws the person in possession as pledgee of pledged property shall be treated as the owner. No reason appears why their natural meaning should not be attributed to the words in this connection. It has been decided that under this clause property of another held under the lien of a pledge either by a natural person or by a foreign corporation as pledgee is taxable to the pledgee. *Boston Loan Co. v. Boston*, 137 Mass. 332. It is difficult to conceive of a purpose on the part of the Legislature to treat every other pledgee in possession of pledged personal property as the owner for the purposes of taxation and to make an exception in that respect of domestic corporations.

Substantially all our general laws respecting taxation have been codified in St. 1909, c. 490. The combination in one comprehensive act of most if not all of our laws respecting taxation compels the inference that the Legislature intended to create a general system consistent in its main provisions and harmonious in its details. It cannot be assumed that a different principle should be applied to the same property dependent upon the accident of possession by a domestic corporation, instead of by a natural person or a foreign corporation.

The maximum limit of taxation of domestic corporations in instances to which it is applicable operates as an exemption of some property from the burden of taxation. It is a general rule that exemptions from taxation are interpreted strictly and are not allowed unless plainly established.

In ascertaining the maximum limit of the corporation excise, merchandise of a taxable character held by the corporation is to be considered. *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156. The property held in pledge is of that class. In computing the maximum limit of the corporation excise, the general statutory rules as to the person to whom merchandise shall be taxed or who shall be treated as owner for the purpose of taxation should be followed.

The tax act means that in ascertaining the maximum limit under § 43, there should be considered, as a part of the principal upon which the twenty per cent is taken, all the merchandise to which the corporation holds title or to which its relation is such

that it would be liable for a property tax if it were subject to the general laws touching property taxation instead of to an excise tax.

It follows from all these considerations that pledged property, for the purposes of interpretation of the tax act, is to be deemed to be owned by the one in possession, whether a domestic or a foreign corporation, or natural person.

*Petition dismissed with costs.*

*P. Nichols*, for the petitioner.

*W. H. Hitchcock*, Assistant Attorney General, for the Commonwealth.

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L. GORDON GLAZIER, trustee, *vs.* JOHN EVERETT.

Norfolk. March 6, 7, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Equity Jurisdiction*, Suit to redeem from tax sale. *Tax*, Redemption from tax sale, Notice by non-resident owner of tax title. *Equity Pleading and Practice*, Appeal, Decree. *Deed*, Construction, In trust. *Trust*, Succession of trustee. *Eminent Domain*. *Damages*, For property taken or impaired under statutory authority.

On an appeal from a decree for the plaintiff in a suit in equity in the Superior Court under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale, where the evidence was taken by a commissioner but no statement of facts found was made by the judge, this court must review the evidence and decide the case on their own judgment both as to facts and as to law, but the trial judge's findings as to facts upon oral testimony necessarily implied by his disposition of the case are not to be reversed unless plainly wrong.

In a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale which occurred more than two but less than six years before the commencement of the suit, if it appears that the defendant, who purchased the land at the tax sale, did not reside in the town where the land was and had not appointed the agent nor given the notice required of such a non-resident owner of a tax title by St. 1909, c. 490, Part II, § 46, a decree should be entered for the plaintiff if the general equities disclosed by the evidence require it. Following *Davidson v. Stafford*, 210 Mass. 145.

In the present suit it appeared that, shortly after the assessment of the tax for the collection of which the land was sold, the land was conveyed to a trustee for an unincorporated association of individuals called a land company, that the trustee died before the sale, leaving his affairs considerably involved, that two persons

who in turn had succeeded him as trustees had been diligent in efforts to disentangle his affairs and had had no actual notice of the tax sale until just before the commencement of the suit, that the property in the meantime had been taken by the town by eminent domain for water supply purposes, that the value of the claim for damages for such taking of the land was said to be \$2,000 and that the amount due on redemption was \$14. *Held*, that the general equities required a decree for the plaintiff.

A deed of land recited that the consideration was paid by B "as he is Trustee of a voluntary association known as the" O Company. The grant was to B "Trustee" and the habendum to B, "Trustee, and his successors theirs and assigns." A declaration of trust by B as trustee of the O Company, an unincorporated association of individuals formed for the purpose of dealing in land, was recorded in the same registry of deeds as was the deed. The declaration of trust was not referred to specifically in the deed. *Held*, that the conveyance was intended to be to B in his capacity as trustee for the association.

Where, upon the death of a trustee who held title to land as trustee of an unincorporated association of individuals called a company, a declaration of which trust was recorded in the registry of deeds, two successors were appointed in turn, the first by the Probate Court and, upon his death, the second by selection of the holders of a certain number of the shares, both of which methods were provided for in the declaration of trust, the trustee last appointed thereby succeeds under the provision of R. L. c. 147, § 6, to a right to maintain a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem the land from a sale made after the death of the original trustee for the collection of a tax assessed before the property was conveyed to the original trustee.

Where in such a suit it appears that a decree should be made for the plaintiff, but it also appears that since the tax sale the land has been taken by eminent domain by the town for water supply purposes and that a claim for damages resulting from such taking is unsatisfied, the decree should recite that the plaintiff is entitled to redeem upon the tender or payment of the tax, interest and proper charges, should state the fact of the tax sale and the taking by the town and should include a mandate that the defendant execute and deliver to the plaintiff an assignment of all his right, title and interest in the damages accruing from such taking, together with the right to use his name so far as necessary for the collection of the damages by petition or otherwise, but without expense to him.

RUGG, C. J. This is a bill in equity under Part II, § 76, of the tax act (St. 1909, c. 490), to redeem land sold for taxes. The case was heard by a judge of the Superior Court,\* who, without making any finding of facts, entered a decree in favor of the plaintiff. The evidence was taken by a commissioner. No rulings of law were requested and no exceptions taken. The defendant's appeal brings the case here. The entry of the decree implies a finding of every fact essential to the right entry of that decree permitted by the evidence. It is for this court to review the evidence and decide the case on its own judgment, both as to facts as well

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\* *Dubuque, J.*

as law. But under the familiar rule, where oral testimony has been heard, the finding of the trial judge as to facts, either expressly made or necessarily implied by his disposition of the case, will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200.

The sale to the defendant was made upon the tax assessed for the year 1907 to one Devlin. No question has been made as to the correctness of the assessment and the regularity of the sale, which occurred in September, 1909.

The defendant, who was the purchaser at the tax sale, resided in Canton. He did not appoint an agent residing in Sharon, where the land was situated, or in Dedham, where the deed was recorded, authorized to release the land, and he did not file with the treasurer of Sharon nor in the registry of deeds at Dedham a statement of his residence and place of business. Thus he failed wholly to comply with the provisions of § 46 of Part II of the tax act. It was held in *Davidson v. Stafford*, 210 Mass. 145, that such failure was sufficient ground to warrant the sustaining of a bill in equity for redemption within the six years limited by § 76, even though after the expiration of the two years, which is the usual limit for redemption from tax sales fixed by § 59. That case governs the present upon that point. The question is whether the general equities disclosed by the evidence require a decree in favor of the plaintiff.

A declaration of trust signed by John A. Bowman, dated June 30, 1899, recited among other matters the conveyance of certain lands therein described to him as trustee for the benefit of holders of certificates in an unincorporated association of named individuals, who also signed the declaration. The name of the association was the Oakland Park Land Company. The general purposes of the trust were to manage, develop and sell the real estate therein described, and to purchase other real estate, and to hold and dispose of all of it in accordance with the trust.

The land in question was conveyed to John A. Bowman as trustee by deed recorded in May, 1907. He died in February, 1908. The declaration of trust provided that, in case of the death of the trustee, his successor might be appointed by the judge of the Probate Court for the county where the land was situated. In accordance with this provision, George M. Glazier was appointed trustee in October, 1908. He died in February, 1914, and the present plaintiff was appointed trustee by two shareholders in the

trust holding not less than a majority of the shares, which was another method for filling a vacancy in the position of trustee provided by the declaration of trust. This declaration of trust was recorded in the registry of deeds for the county where the land was situated.

Although the declaration of trust was not referred to specifically in the deed by which the land was conveyed to John A. Bowman, yet that deed recited the consideration as "paid by John A. Bowman . . . as he is Trustee of a voluntary association known as the Oakland Park Land Company," and the grant was "unto the said John A. Bowman, Trustee," and the habendum "to the said John A. Bowman, Trustee, and his successors theirs and assigns." Although the conveyance is not expressed with accuracy, yet its intent is not difficult to discover. It disclosed the payment of the consideration by Bowman as trustee for the Oakland Park Land Company. That fact would be enough to raise a resulting trust in favor of the one paying the consideration, even though the conveyance had been to Bowman alone. *Howe v. Howe*, 199 Mass. 598. But the grantee named is "John A. Bowman, Trustee." This in connection with the rest of the deed shows that the conveyance was intended to be to Bowman in his capacity as trustee of the association. It is enough to disclose a design to bring it under the operation of the declaration of trust. *Byam v. Bickford*, 140 Mass. 31. The effectuation of this intent is not inconsistent with any rule of law or incompatible with the terms of the grant. *Simonds v. Simonds*, 199 Mass. 552, 554.

The title to the land vested in Bowman as trustee. At common law the appointment of new trustees in succession by the parties (not in execution of a special power), did not vest the title in the new trustees without conveyance. *Peabody v. Eastern Methodist Society in Lynn*, 5 Allen, 540. It was said by Wells, J., in *National Webster Bank v. Eldridge*, 115 Mass. 424, 428, that "The appointment of the trustees not having been made under the authority of the statute, it would follow . . . that the provisions of the Gen. Sts. c. 100, § 9, would not operate to vest the title in them." That decision was rendered in 1874. The difficulty there pointed out was remedied by St. 1878, c. 254, whereby it was provided that the title to property held by trustees should vest in their successors "chosen or appointed in conformity to any

written instrument creating a trust, in place of former trustees thereunder." This statute is embodied in effect in R. L. c. 147, § 6. It follows that the title to the land in question, having vested in Bowman as trustee, devolved upon his successors in turn, appointed according to the terms of the declaration of trust, without special conveyance. *Parker v. Converse*, 5 Gray, 336. *Nugent v. Cloon*, 117 Mass. 219, 221. *Sells v. Delgado*, 186 Mass. 25, 29. The plaintiff is therefore the proper person to bring a petition to redeem. He took the title to the trust property by selection and acceptance, which was the only qualification required by the trust. *Bisbee v. Mackay*, 215 Mass. 21, 23.

The circumstances are such as to warrant the maintenance of a bill to redeem. Bowman died before the land was sold for taxes. There was evidence that his affairs were considerably involved, both individually and in connection with another trust, as well as with that of the Oakland Park Land Company; that his two successors were diligent in their efforts to untangle these affairs and that they had no actual notice of the tax sale until just before the present suit was instituted. The value of the claim for damages which now stands in place of the property is said to be \$2,000, while the amount due on redemption is about \$14. The defendant has made no expenditures on the land. The bill was seasonably brought after knowledge of the tax sale. Without narrating the evidence further, it is enough to say that we think the plaintiff is entitled to redeem. *Widersum v. Bender*, 172 Mass. 436. *Holbrook v. Brown*, 214 Mass. 542.

There is one condition which renders necessary a modification of the decree.\* The land was taken by the town of Sharon under the power of eminent domain for a water supply in 1913. Thus the title to the land before the filing of the present bill had been seized by the authority of the sovereign vested in the town. *Weeks v. Grace*, 194 Mass. 296. Therefore there is no land title to redeem. All that remains is the right of action against the town.

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\* The original decree recited that "it was adjudged, ordered and decreed" that the plaintiff be allowed to redeem from the defendant the land described in the bill, upon the tender or payment of \$14.13 by the plaintiff to the defendant and that defendant "shall forthwith execute, acknowledge and deliver to the" plaintiff "a proper deed conveying to him all his right, title and interest in and to" the parcel of land described in the bill.

Under the tax act, Part II, § 44, the deed conveyed, "subject to the right of redemption, all the right and interest which the owner had in the land when it was taken for his taxes." The sale for taxes therefore "creates a title paramount" which would become absolute by the lapse of time. *Langley v. Chapin*, 134 Mass. 82. In equity the right to petition for the assessment of damages caused by the seizure under eminent domain and the money due therefor, St. 1913, c. 128, § 3, stands in place of the land and may be treated as the land would be treated if there had been no taking by the town. *Gibson v. Cooke*, 1 Met. 75. *Holland v. Craft*, 3 Gray, 162, 180. *Simonds v. Simonds*, 112 Mass. 157, 164. It does not appear whether the defendant as the person appearing of record as the owner, *Butler v. Stark*, 139 Mass. 19, *Connors v. Lowell*, 209 Mass. 111, 122, has brought a petition for the assessment of the damages caused by the taking. In any event the decree should be modified by striking out the requirement that the defendant execute a deed, and by substituting a recital of the tax sale and of the taking by eminent domain by the town, and by inserting a mandate that there be executed and delivered to the plaintiff by the defendant an assignment of all his right, title and interest in the damages accruing from such taking, together with the right to use his name so far as necessary, but without expense to him, for the collection of the damages by petition or otherwise. The decree also is to be modified as to the amount to be paid by the plaintiff, so far as may be necessary by the lapse of time, and to include the costs of appeal. The details may be settled in the Superior Court.

*So ordered.*

*J. Everett, pro se.*

*W. H. Rand, Jr., (J. A. McNamara with him,) for the plaintiff.*



**FRED W. WEITZEL, receiver, vs. HENRY P. BROWN.**

Suffolk. March 8, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Evidence, Certificates of national comptroller of currency, Judicial notice. National Bank, Liability of shareholder. Receiver. Corporation. Jurisdiction.*

The court will take judicial notice that a person, who signed as "acting comptroller of the currency" a certificate bearing the seal of the comptroller of the currency of the United States and asserting the truth of copies of originals on file in that office, held that office and will assume that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller and was therefore at the time acting comptroller.

Under U. S. Rev. Sts. §§ 178, 327, 884, copies of papers on file in the office of the national comptroller of the currency, certified by his deputy and authenticated by his seal of office, are competent evidence, in an action by a receiver of a national bank to recover the amount of an assessment upon a shareholder, to prove the charter of the bank, its extension, the adjudication of insolvency by the comptroller, the appointment of the plaintiff as receiver, the assessment and the authorizing and directing of the receiver to bring suit for its collection.

In an action by a receiver of a national bank against a shareholder for the amount of an assessment made by the comptroller of the currency, the defendant cannot inquire into the legality of the plaintiff's appointment nor question the validity of the bank's incorporation.

At the trial of the above action, it appeared that, at the end of twenty years after the issuing of the original charter of the bank, the charter was extended but that the defendant did not assent to the renewal, but there was evidence that the defendant did not withdraw as a shareholder nor transfer his shares, and that he continued to receive dividends as they were declared, and it was held that a finding was warranted that his name appeared upon the books of the bank as a shareholder with his consent.

An assessment made by the comptroller of the currency of the United States upon the shareholders of an insolvent national bank binds them even if it is levied without notice to them.

A receiver of a national bank, who has been ordered by the comptroller of the currency "to take all necessary proceedings, by suit or otherwise," to enforce the individual liability of shareholders of the bank under an assessment made upon them by the comptroller, can maintain in his own name as receiver an action against a shareholder for the collection of the assessment.

The courts of this Commonwealth have jurisdiction of an action of contract against a resident of this Commonwealth by a receiver of a national bank in Kentucky for the collection of the amount of an assessment made by the comptroller of the currency upon the plaintiff as a shareholder.

**CONTRACT** by the receiver of the First National Bank of London, Kentucky, for the amount of an assessment alleged to have been

made by the comptroller of the currency of the United States on the defendant as a shareholder in that bank. Writ dated June 8, 1915.

In the Superior Court the case was tried before *Fox, J.*

The plaintiff offered in evidence, certified as true by a certificate bearing the seal of the comptroller of the currency and signed by one alleging himself to be "acting comptroller of the currency," copies of the original certificate of the "deputy and acting comptroller of the currency," dated November 28, 1888, authorizing the bank to do business, of the original certificate of the comptroller of the currency dated December 26, 1908, authorizing extension of the corporate existence of the bank, of the original declaration dated April 9, 1914, by the comptroller of the currency that the bank was insolvent, of the commission appointing the plaintiff receiver, and of the assessment upon the shareholders, dated August 20, 1914, and signed by the comptroller of the currency, which directed the plaintiff "to take all necessary proceedings, by suit or otherwise, to enforce . . . the said individual liability of the said shareholders."

These copies were admitted in evidence subject to exceptions by the defendant.

It did not appear that the defendant had any notice of any application for or of any granting of an extension of the incorporation period of the bank.

Other evidence is described in the opinion. The trial judge ordered a verdict for the defendant and reported the case to this court for determination upon a stipulation by the defendant that if the ordering of a verdict was wrong and on any issue and upon the competent and admissible evidence the cause should have been submitted to the jury, judgment should be entered forthwith for the plaintiff for \$1,000 with interest from September 21, 1914; otherwise, or if the Superior Court did not have jurisdiction of the cause, judgment should be entered on the verdict.

*H. P. Brown, pro se.*

*A. T. Wright, for the plaintiff.*

BRALEY, J. By the U. S. Rev. Sts. § 884, "Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies

of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer." And by §§ 178, 327, a deputy comptroller of the currency may exercise the powers and discharge the duties attached to the office of comptroller during a vacancy in that office or in the absence or inability of the comptroller. If necessary the court also will take judicial notice that a certain person was deputy comptroller, and will assume "that, at the date of his certificate, he was authorized to exercise the powers and discharge the duties of the comptroller, and was therefore, at the time, acting comptroller." *Keyser v. Hitz*, 133 U. S. 138, 146.

It is plain under these statutes that all of the certificates from the comptroller's office authenticated by his seal were admissible in evidence. *Keyser v. Hitz*, 133 U. S. 138. *Bowden v. Johnson*, 107 U. S. 251. See Wigmore on Evidence, §§ 1677, 1684.

The power to adjudicate that a national bank is insolvent, and to appoint a receiver, and to levy assessments on the stockholders, and to order their collection being vested in the comptroller, the defendant cannot inquire into the legality of the plaintiff's appointment. U. S. Rev. Sts. § 5234. It is enough that he has been appointed and is a receiver in fact. *Cadle v. Baker*, 20 Wall. 650.

The jury from the defendant's answers to the interrogatories and his correspondence with the plaintiff well could find, that, even if he did not assent when the charter of the bank was renewed, he neither withdrew nor transferred his shares, but continued to receive dividends as they were declared and his name as a shareholder appeared on the books of the bank with his consent at the date of insolvency.

It moreover is settled that the validity of the bank's incorporation is not open to collateral attack by the stockholder whose liability the receiver seeks to enforce. *Casey v. Galli*, 94 U. S. 673.

The assessment made by the comptroller also bound the defendant even if levied without notice to him. *United States v. Knox*, 102 U. S. 422. *Finn v. Brown*, 142 U. S. 56.

And the comptroller's certificate being sufficient evidence of the plaintiff's appointment, and, he having been ordered as receiver to enforce the individual liability of the shareholder under the

assessment, the action can be maintained in his own name. *Kennedy v. Gibson*, 8 Wall. 498. *Bank v. Kennedy*, 17 Wall. 19. *Howarth v. Lombard*, 175 Mass. 570, 576, 578. *Platt v. Beebe*, 57 N. Y. 339.

It is urged that the trial court was without jurisdiction. But, being domiciled in this Commonwealth and the plaintiff as receiver being clothed with all the rights which the bank as a citizen possessed to bring suit on any demand it might have held against him, the defendant can be impleaded in our own courts and the plaintiff is not obliged to resort to the federal tribunals. 24 U. S. Sts. at Large c. 373, § 3. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778. *Petri v. Commercial National Bank of Chicago*, 142 U. S. 644. *Ex parte Jones*, 164 U. S. 691, 693. *Cragie v. Hadley*, 99 N. Y. 131. *Davis v. Watkins*, 56 Neb. 288. The liability is contractual and not statutory. *Richmond v. Irons*, 121 U. S. 27. *Converse v. Ayer*, 197 Mass. 443, 454.

The plaintiff having been entitled to go to the jury before a court having jurisdiction of the subject matter and of the parties, he is to have judgment in accordance with the terms of the report for the amount stipulated with interest.

*So ordered.*

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HOPEDALE MANUFACTURING COMPANY vs. CLINTON COTTON MILLS & others.

Suffolk. March 8, 9, 1916, — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Equity Jurisdiction*, To reach and apply equitable assets. *Words*, "Any property . . . or interest."

A suit in equity cannot be maintained against a foreign corporation having no usual place of business in this Commonwealth and a firm with which the corporation had a contract of agency for the sale of its goods to reach and apply toward the payment of a debt of the corporation to the plaintiff property of the corporation alleged to be in the possession of the firm and not to be subject to process in an action at law, where it appears that at the time of service of process upon the firm they did not have possession of any property of the corporation or owe it anything, although, under their contract with the cor-

poration, if the corporation fulfilled certain unperformed contracts for goods which the firm had placed with it on behalf of their customers, the firm might at some future time owe money to the corporation.

The "property, right, title or interest, legal or equitable, of a debtor" which can be reached and applied by a suit in equity under R. L. c. 159, § 3. cl. 7, are those in existence when the suit is brought.

**BILL IN EQUITY**, inserted in a writ of trustee process dated June 25, 1915, seeking to have the defendant Clinton Cotton Mills adjudged indebted to the plaintiff in the sum of \$8,096 and interest and to reach and apply in satisfaction of that debt "any money or moneys due or that may hereafter become due from" the defendants Harding and Tilton to the Clinton Cotton Mills "under any contract or contracts now existing" between them.

The case was heard by *McLaughlin, J.*, on an application for a preliminary injunction against Harding and Tilton, on the bill without an answer, and there were in evidence, besides the contract between Harding and Tilton and the Clinton Cotton Mills, a statement, signed by the plaintiff and the attorney for Harding and Tilton, of what Harding, who was absent, would testify if he were present.

One clause of the contract between Harding and Tilton and the Clinton Cotton Mills was as follows:

Article III, clause 2. "The Agents shall make general advances to the Mill from time to time as required up to the aggregate maximum amount of Two Hundred and Twenty-five Thousand Dollars (\$225,000), but not more. They shall also make advances up to the full market value against unsold merchandise consigned to them up to an amount of Twenty-five Thousand Dollars (\$25,000), but not more. The Agents shall accept consignments of manufactured products against sales and make payments therefor or advances thereon up to the full market value of such consignments, less commissions, expenses and New York freight allowance. The \$225,000 general advances and also any advances up to \$25,000 against unsold merchandise shall be covered by six months' notes of the Mill bearing interest at the rate of six per cent (6%) per annum and renewable at the request of the Agents. These notes shall be endorsed by Mercer S. Bailey and William J. Bailey and may be retained by the Agents or used by them in their own loans."

Other provisions of the contract are described in the opinion.

From the statement of Harding it appeared that the entire advance of \$225,000 had been made by his firm to the corporation, for which they held the corporation's unmatured notes; that the corporation also owed the firm \$7,528.03 for advances by the firm beyond the amounts of sales made by the firm of the corporation's goods, which included sales of goods on ten days' credit for which the firm had not been paid by the customers.

It further appeared from the statement that there also were amounts, probably double in amount the sum claimed by the plaintiff, covered by contracts already entered into by the firm with their customers for delivery of Clinton Cotton Mills products to be manufactured in the future. Such amounts were not payable to the firm in any event until after delivery of the products had been made; but by the terms of the firm's contract they were bound to make deliveries as called for in the contracts, and orders to that effect in every instance had been given by the firm to the Clinton Cotton Mills. As deliveries under such contracts were made the firm would be in position to apply such amounts, less commissions, freight allowances and other charges, to the credit of the Clinton Cotton Mills.

The judge, after finding the facts above described, ruled that under the contract between the Clinton Cotton Mills and Harding and Tilton, the right of the corporation, in accordance with the terms and conditions therein contained, to receive the proceeds of sales of its products under those contracts of sale already made by Harding and Tilton when the notice was served, was not property or any right, title or interest of the Clinton Cotton Mills which could be reached to be attached or taken on execution in an action at law, but was property, right, title and interest of the Clinton Cotton Mills which could be reached and applied under the provisions of R. L. c. 159, § 3, cl. 7; and accordingly an interlocutory decree for a temporary injunction was issued. Harding and Tilton appealed.

Thereafter Harding and Tilton filed a demurrer and a plea and the Clinton Cotton Mills filed a special appearance and a motion to dismiss the suit, and the plaintiff filed a motion to strike from the record the special appearance and the motion to dismiss.

The suit was further heard upon the demurrer, plea and motions by *McLaughlin*, J., and by his order an interlocutory decree

was issued overruling the demurrer and plea and denying both motions; and, being of the opinion that the two interlocutory decrees above referred to so affected the merits of the controversy that the matter ought to be determined by this court before further proceedings, the judge reported the case, "the decrees to be affirmed or such further or different order or orders or decree or decrees to be entered as justice and equity may require."

*R. Spring*, for the plaintiff.

*A. A. Ballantine*, for the defendant Clinton Cotton Mills.

*E. H. Abbot, Jr.*, for the defendants Harding and Tilton.

**BRALEY, J.** The plaintiff, instead of commencing suit by bill with a writ of subpoena according to the usual course of proceedings in equity, inserted the bill in an original writ of summons and attachment by trustee process as permitted by R. L. c. 159, § 8. While the trustees, the individual defendants, are described as within this jurisdiction, the defendant, the Clinton Cotton Mills, a foreign corporation, is described as having its usual place of business without this Commonwealth, and, no personal service having been made, the court is without jurisdiction unless the individual defendants who have been duly summoned and are subject to our process had in their possession or control at the date of service, goods, effects or credits of the mills which can be reached and applied under R. L. c. 159, § 3, cl. 7, in satisfaction of the demands alleged in the bill. *Koontz v. Baltimore & Ohio Railroad*, 220 Mass. 285, 287, and cases cited. *Travelers Ins. Co. v. Maguire*, 218 Mass. 360, 362. It is the plaintiff's contention that upon the record they are chargeable, and that consequently upon establishment of its claim a valid judgment can be entered against the property held by garnishment after notice to the mills in accordance with R. L. c. 170, §§ 1, 6, which has been given. *Lowrie v. Castle*, 198 Mass. 82. *Snyder v. Smith*, 185 Mass. 58, 62. This question must be decided on the stipulation and the evidence recited in the record, which, having been introduced by agreement of parties, is to be taken as true.

The individual defendants are resident agents engaged to sell the products of the Clinton Cotton Mills upon commission under a contract terminable on six months notice by either party to the other party, which among other terms provides, that the agents should make general cash advances to the mills from time to time

for an aggregate maximum amount, and also should advance to the full market value against unsold merchandise consigned to them for a further stipulated amount. To cover the advances, the mills engaged to give its interest bearing promissory notes on six months' time, indorsed by certain parties named in the contract, which were to be used by the agents in their own loans. To secure the notes, advances, balances and commissions the mills gave a lien to the agents "on all its manufactured cloth products" whether in its possession or in transit or in possession of the agents, and on all "receivables," representing the proceeds of sales of cloth products, with authority upon default under any of the terms of the contract forthwith to sell for their own account in satisfaction of this lien at full market price and in such manner as they may determine any of such merchandise, and to sue for and collect for their own account any and all outstanding "receivables" for such merchandise, and to apply the proceeds of sale or collection toward the settlement of all outstanding obligations between the parties.

It is apparent that, because of advances under the contract, and of outstanding contracts entered into with their customers for delivery of the products of the mills to be manufactured in the future, there were no credits due from the agents to the mills either in money or merchandise at the date of service.

If, however, the agents could not be charged either in trustee process under R. L. c. 189, *Koontz v. Baltimore & Ohio Railroad*, 220 Mass. 285, 288, or under R. L. c. 159, § 3, cl. 7, as having "any property, right, title or interest, legal or equitable" of the mills in their possession or control, the plaintiff, relying on *Lord v. Harte*, 118 Mass. 271, presses the argument that, the contract not having been terminated, moneys which might become due and payable in the future upon an accounting can be reached and applied. But while the statute uses the words "any property, right, title or interest, legal or equitable, of a debtor" the "property, right, title or interest" must be in existence when the proceedings to reach and apply are instituted. *Silloway v. Columbia Ins. Co.* 8 Gray, 199, 203. *Geer v. Horton*, 159 Mass. 259, 261. *Snyder v. Smith*, 185 Mass. 58. *Hosher-Platt Co. v. Miller*, 190 Mass. 285. The obligations between the agents and their principal are not only mutual but purely executory, and a court of equity will not compel performance of an executory contract for the benefit of a



creditor of one of the parties. As said by Mr. Justice Field in *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411, 419, when speaking for the court, of property which may be reached and applied by a bill in equity before judgment, "No case . . . appears in our reports where under this process a plaintiff has been permitted to compel a debtor to execute on his part an executory contract made with other persons, or has been permitted to execute it for him in order that the plaintiff may compel these other persons to perform their part of the contract for the benefit of the plaintiff; neither has any claim for unliquidated damages for the breach of an executory contract been reached and applied under this procedure." This rule has been recognized and followed in *Wheelock v. Globe Construction Co.* 195 Mass. 456. *Eastern Electric Cable Co. v. Great Western Manuf. Co.* 164 Mass. 274, 276, *Geer v. Horton*, 159 Mass. 259, 261. The royalties payable to the debtor under the contract with the publishers in *Lord v. Harte*, 118 Mass. 271, depended solely upon the sale of his works, and royalties due or to become due resulted in a debt for definite sums of money which the debtor could be decreed to assign or transfer to the creditor. *Silloway v. Columbia Ins. Co.* 8 Gray, 199. But in the present case independently of the fact that the mills have not appeared generally and an assignment could not be ordered, it cannot be found that any moneys or merchandise will be due eventually from the agents to their principal when the contract has been terminated which they can be compelled to retain for the plaintiff's benefit.

It will be seen from what has been said that the bill cannot be maintained, and, whether the allegations are sufficient to show an enforceable debt, or whether the demurrer and plea of the individual defendants were overruled rightly need not be decided.

The interlocutory decree denying the motion of the mills to dismiss must be reversed, and a decree is to be entered granting the motion and dismissing the bill with costs. *Bennett v. Sweet*, 171 Mass. 600. *Hey v. Prime*, 197 Mass. 474. *Koontz v. Baltimore & Ohio Railroad*, 220 Mass. 285.

*Ordered accordingly.*

## HERBERT D. BOYD vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 9, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, &amp; PIERCE, JJ.

*Practice, Civil, New trial.*

In an action against a corporation operating a street railway for personal injuries sustained from being run into by a street railway car of the defendant in front of which the plaintiff was attempting to drive across the defendant's tracks in his automobile, the jury found in answer to special questions submitted to them by the judge that the plaintiff was in the exercise of due care and that the defendant was not negligent and the judge ordered a verdict for the defendant; whereupon the plaintiff moved for a new trial on the ground that the verdict was against the law as stated to the jury by the judge, that it was against the evidence and the weight of evidence, that the special findings of the jury were inconsistent and that on the evidence one or the other of the findings must be wrong. The presiding judge denied the motion. *Held*, that the denial of the motion was within the discretionary power of the judge.

In the same case upon the hearing of the motion for a new trial the judge refused to rule at the request of the plaintiff that as matter of law on all the evidence the findings of the jury that the plaintiff was in the exercise of due care and that the defendant was not negligent were unwarranted, and that as matter of law on all the evidence and upon the findings of the jury there was a mistrial. The evidence of the plaintiff on both the issues was contradicted by that of the defendant. *Held*, that on the conflicting evidence the answers of the jury were neither inconsistent nor unwarranted, and that, as both parties had been found to have used ordinary care, the plaintiff's misfortune was not attributable to the fault of the defendant.

TORT for personal injuries sustained on May 1, 1914, at the corner of Centre Street and Cedar Street in the part of Boston called Roxbury by reason of a collision between a semi-convertible street railway car of the defendant and an automobile driven by the plaintiff. Writ dated May 9, 1914.

In the Superior Court the case was tried before *Raymond, J.* There was evidence, for the plaintiff, that the plaintiff was driving westerly down Cedar Street toward Centre Street in a Ford five-seated automobile; that in front of him was a baker's cart, which somewhat obstructed his way; that after the baker's cart turned up Fort Street, at his left, the plaintiff proceeded on the right hand side of Cedar Street to go directly across Centre Street and then to turn to his left down Centre Street toward Jamaica Plain; that

on Centre Street were parallel tracks of the defendant, cars running from his left toward his right as the plaintiff faced Centre Street on the track nearer to him, and from his right toward his left on the farther track; that as he approached Centre Street his view of the defendant's tracks on his left was obstructed by the baker's cart and by a high stone wall with a paling fence on top of it; that when he was six or eight feet from the nearer car track he was going very slowly in his automobile, due to his progress having been obstructed by the baker's cart; that he had been listening and looking for any approaching street car and neither had seen nor had heard any; that at that point he saw, about thirty-five or fifty feet distant from him, a street railway car approaching on his left; that he could not stop nor reverse nor go into high speed and deemed it best to go directly ahead across the street; that when he looked at the motorman he noticed that the motorman was turning his head and was looking at the baker's cart; that before the plaintiff could get across in front of the car his automobile was struck and overturned; and that the speed of the street railway car was about twenty miles an hour.

The foregoing evidence tending to show due care on the part of the plaintiff and negligence on the part of the defendant's motorman was contradicted on both of these issues by evidence introduced by the defendant.

At the close of his charge to the jury the judge, at the request of the plaintiff, instructed the jury as follows:

"While the plaintiff was not excused from using his own senses of sight and hearing, he had a right to assume that the motorman of the approaching street railway car would give the warning signal when approaching crossings and would so slacken the car's speed as to protect travellers whose presence at the crossing in the operation of the street railway might be expected.

"I thought I covered that in my charge but, if I did not, I assent to that as the law. On the question of his [the motorman's] negligence you should bear in mind whether or not he did the things the rules called for as to sounding gongs and the rate of speed and watching out, etc. All of that is for you.

"If the jury shall find that the motorman was disobeying a rule of the defendant with regard either to the speed at which he approached the crossing, the ringing of a gong or the giving

of other signals, or the keeping of a lookout for other persons on the highway, they may find that the motorman was negligent and that his negligence caused the plaintiff's injury.

"That is, that is evidence from which you may find that, if on all the evidence you do say that he was not using reasonable care."

The judge submitted to the jury two special questions as follows:

"Was the plaintiff in the exercise of due care?"

"Was the defendant negligent?"

The jury answered the first question in the affirmative and the second question in the negative. The answers were returned in the midst of a session of the court, and thereupon the presiding judge in the absence of the counsel and without sending for them or requesting their attendance, ordered a verdict for the defendant.

The plaintiff filed a motion that the verdict of the jury be set aside and a new trial granted on the following grounds:

"1. Because the verdict was against the law as stated to the jury by the court.

"2. Because the verdict was against the evidence and the weight of the evidence.

"3. Because the special findings of the jury were inconsistent with each other and with the evidence.

"4. Because both of the special findings of the jury could not be based upon the same findings of basic facts by the jury; one or the other of the findings was wrong."

The motion was heard by the presiding judge and, before the argument upon it, the plaintiff presented to the judge the following requests for rulings:

"1. As a matter of law on all the evidence, the findings of the jury both that the plaintiff was in the exercise of due care and that the defendant was not negligent were unwarranted.

"2. As a matter of law on all the evidence and upon the findings of the jury in answer to the special questions, there was a mistrial."

The judge refused to make the rulings requested by the plaintiff and denied the motion. The plaintiff alleged exceptions.

*E. V. Grabill*, for the plaintiff.

*E. P. Saltonstall*, (*R. S. Pattee* with him,) for the defendant.

BRALEY, J. It was discretionary with the presiding judge whether he should grant the plaintiff's motion for a new trial on any of the grounds specified, and the exercise of his discretion would not be reviewable on exceptions. *Welsh v. Milton Water Co.* 200 Mass. 409, 411, and cases cited.

But, the plaintiff having seasonably requested the judge to rule that "as a matter of law on all the evidence, the findings of the jury both that the plaintiff was in the exercise of due care and that the defendant was not negligent were unwarranted," and that "as a matter of law on all the evidence and upon the findings of the jury in answer to the special questions, there was a mistrial," and the requests having been refused, the correctness of the rulings is open on the exceptions. *McDonnell, petitioner*, 197 Mass. 252.

Of course questions of law that were or might have been raised at the trial cannot be raised again on a motion for a new trial. *Loveland v. Rand*, 200 Mass. 142. We understand the plaintiff's contention to be that the answers of the jury are necessarily inconsistent and therefore unwarranted.

The evidence need not be recapitulated. The plaintiff's automobile driven by himself came into collision with a street railway car of the defendant while each was using a public way, causing personal injuries for which he seeks damages. In order to recover he had the burden of satisfying the jury on conflicting evidence that, he being in the exercise of due care, the collision occurred solely through the negligence of the defendant. While these fundamental issues were presented in the form of questions submitted under instructions to which no exceptions were taken, nevertheless they were matters of fact wholly within the province of the jury. *Hennessey v. Taylor*, 189 Mass. 583, and cases cited. And the answers of the jury, which in substance decided that neither the plaintiff nor the defendant was careless, are neither inconsistent nor unwarranted. *Perkins v. Bay State Street Railway*, 223 Mass. 235. If each party used ordinary care the plaintiff's misfortune is not attributable to the fault of the defendant, and he must bear the burden which the law places upon him. *Brown v. Kendall*, 6 Cush. 292, 296. *Tracy v. Boston Elevated Railway*, 217 Mass. 569. *Henry v. Grand Avenue Railway*, 113 Mo. 525, 537.

*Exceptions overruled.*

## ANN M. HEYWOOD vs. GARABED OGASAPIAN.

Essex. March 10, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, &amp; PIERCE, JJ.

*Agency, Existence of relation, Scope of authority.*

Where, at the trial of an action for personal injuries received by the plaintiff, when he was a traveller on the highway, by reason of his being run into by an automobile, there is evidence tending to show that at the time of the accident the automobile was being driven by the defendant's son-in-law, that the defendant was the proprietor of a fruit, confectionery and ice cream store and had been so for a number of years, that during these years the son-in-law had lived with him over the store and had worked with him in the business, that he continued to do so for a number of months after the accident, that previous to two months before the accident a large part of the business had been carried on at adjoining beaches by the use of a team, that then the team was given up and an automobile was purchased which was used in its place, that the automobile was insured in the name of the defendant and that his name in full was painted on its outside, the jury are warranted in finding that the automobile was owned by the defendant and that the son-in-law was his employee, although the defendant offers evidence tending to explain the circumstances in detail and to show that he did not own the automobile and that his son-in-law was not in his employ.

And where at the same trial the plaintiff testifies that at the time of the accident the driver was the only person in the automobile and that its rear door was open, disclosing inside an ice cream freezer and candy boxes, the jury are warranted in finding further that the driver at the time of the accident was engaged in his employer's business, although the defendant's evidence tended to controvert that of the plaintiff.

PIERCE, J. This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff on August 26, 1914, by collision with an automobile while she was crossing on foot a certain highway in the town of Salisbury. The case was tried before a judge of the Superior Court \* and a jury.

At the close of the plaintiff's evidence, the defendant moved that a verdict be directed for the defendant on the ground that there was no evidence warranting a verdict for the plaintiff. This motion was overruled and the defendant duly excepted.

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\* *Sanderson, J.* The jury returned a verdict for the plaintiff in the sum of \$1,800; and the defendant alleged exceptions.

At the close of the evidence, the defendant asked the judge to instruct the jury among other things as follows:

"1. Upon all the evidence the plaintiff is not entitled to recover."

"3. There is no evidence that the operator of the automobile which collided with the plaintiff was acting as the servant or agent of the defendant at the time of the accident.

"4. There is no evidence that said accident happened during the course of the employment of Hiki Keljikian by the defendant.

"5. There is no evidence that said automobile was in the control of the defendant, his agents or servants, at the time of the accident."

"8. The fact that the defendant's name was painted upon the automobile is not sufficient evidence to warrant the jury in finding that the defendant had control of the automobile at the time and place of the accident."

"10. Upon all the evidence the jury would not be warranted in finding that the defendant's name was inserted in said policy of liability insurance either at his request or with his knowledge and consent."

"14. Upon all the evidence the jury would not be warranted in finding that said driver was, at the time and place of the accident, acting within the scope of any employment of him by the defendant."

It was admitted that the automobile was being driven at the time of the accident by one Hiki Keljikian; that the plaintiff was in the exercise of due care and that the driver was negligent. As argued, the only question presented is whether upon all the evidence "the defendant could properly be held liable for the negligence of said Hiki Keljikian."

To establish the affirmative of this proposition, the plaintiff produced evidence which, if believed, warranted the jury in finding that the defendant was at the time of the accident, and had been for several years, the proprietor of a fruit, confectionery and ice cream store; that during these years Keljikian, who was his son-in-law and lived with him over the store, had worked in the conduct of the business, and after the accident he continued to do so for several months; that before June, 1914, a large part of the business was carried on at the beaches, a "team" being used to

make deliveries; that in June, 1914, the "team" was given up and an automobile purchased which was used in selling ice cream, confectionery and fruit; that the car was insured in the name of the defendant, and that his name, Garabed Ogasapian, was painted on the outside of the car.

All the above statements of fact were contained in the testimony of the defendant, and he testified and offered other evidence in explanation thereof, and in contradiction of the inferences that might be drawn therefrom, that Keljikian in June, 1914, purchased the car with money of his own or of his daughter; that he did not know the price paid for the car; that none of his money was used to purchase it; that upon the purchase of the car Keljikian registered it in his own name, and immediately went into business for himself selling ice cream, confectionery and fruit at wholesale; that thereupon he, the defendant, "gave up this part of his business of selling at the beaches . . . when his son-in-law engaged in it;" that after Keljikian purchased the car he, Keljikian bought a large part of his merchandise of the defendant; that he sometimes paid cash and sometimes bought on credit; that the defendant's books of account had been burned in a fire which burned another store of the defendant; that he did not know of the painting of his name upon the car until after it had been done; that when he found out his name was there he asked Keljikian, "What is that about my name? Listen me. I don't belong to that auto. Why you put my name on it?" and that Keljikian replied, "We put that name on because we buy the stuff here. I ain't got no name. Everybody knows you;" that he did not know his name was on an insurance policy on the car; and that he "did not request or instruct Keljikian to take these people to ride."

It is plain that the jury could find that the defendant was not the owner of the car, that it was not being operated by his direction, and that Keljikian was not his servant or employee.

But they were not bound so to find. The admitted fact that Keljikian was in the defendant's employ before the accident and again shortly after the accident, the fact that the business of the defendant was carried on without apparent change other than the substitution of an automobile for a team, the fact that the automobile had the name of the defendant painted on the outside of



the car, the fact of the insurance, even the fact of the burning of the record books when taken in connection with all the other admitted facts, warranted the jury in finding, as they did, that the defendant was the owner of the car and that Keljikian was a servant in the employ of the defendant at the time of the accident. *Smith v. Paul Boyton Co.* 176 Mass. 217. *Ingraham v. Chapman*, 177 Mass. 123. *Grant v. Singer Manuf. Co.* 190 Mass. 489. *Norris v. Anthony*, 193 Mass. 225. *D'Addio v. Hinckley Rendering Co.* 213 Mass. 465.

There remains the question, whether upon the evidence the jury were warranted in finding that Keljikian, at the time and place of the accident, was acting within the scope of any employment of him by the defendant. *Perlstein v. American Express Co.* 177 Mass. 530.

The plaintiff testified that at the time of the accident the driver was the only person in the automobile; that the rear door of the automobile was open "and that there were inside the car an ice cream freezer and certain candy boxes." To the contrary, the defendant's witnesses testified that there were four persons and the driver in the car and that they were returning after having taken a pleasure ride to Salisbury Beach at the invitation of Keljikian, who had transacted no business on the trip and was using the car without the knowledge or assent of the defendant.

Should the jury disbelieve the testimony of the witnesses for the defendant, and should it find that the driver of the car was alone and that he had within the car an ice cream freezer and candy boxes, they would be justified in finding the inferential fact that the driver was at the time of the accident engaged in the business of the defendant.

It follows that no reversible error appears in the refusal to give the defendant's requests, and the exceptions must be overruled.

*So ordered.*

*C. N. Barney, (R. T. Woodruff with him,) for the defendant.*

*A. Withington, for the plaintiff.*

## IRENE KENNEDY vs. R. &amp; L. COMPANY.

Suffolk. March 13, 1916, — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; CROSBY, JJ.

*Negligence, Invited person. Automobile.*

A woman who, while travelling in an automobile owned by a corporation dealing in automobiles, receives personal injuries, cannot recover in an action against the owner wherein she alleges and proves that her injuries were caused by negligence of the driver without wanton or reckless misconduct on his part, if, on the aspect of the evidence most favorable to the plaintiff, it appears that, for the sole purpose of accommodating the advertising manager of a corporation publishing a newspaper in which the defendant advertised, the defendant sent the automobile to the house of a woman, who was an employee of the publishing corporation, to take her and her mother to an adjoining city, that that employee and her mother got into the automobile, that then by that employee's direction the automobile was driven to the residence of the plaintiff, who also was in the employ of the publishing corporation, and at the employee's invitation the plaintiff entered it and went on the trip during the course of which she received her injuries.

TORT for personal injuries received, when the plaintiff was in an automobile owned by the defendant, by reason of a collision between it and another automobile. Writ dated February 9, 1914.

In the Superior Court the case was tried before *King, J.* The material evidence is described in the opinion. There was a verdict for the plaintiff in the sum of \$15,505, of which the plaintiff remitted all but \$9,505. The defendant alleged exceptions.

*H. W. Packer & J. W. Allen, (F. A. Winchester with them,)* for the defendant.

*E. Field, (C. C. McCarthy with him,)* for the plaintiff.

BRALEY, J. The plaintiff's due care is conceded, and if, without deciding, it is assumed the jury further could find that the car had been dispatched by a duly authorized agent of the company, that the unlicensed driver while operating the automobile was its servant, and that the plaintiff's injuries were caused by his negligence, the plaintiff cannot recover unless the defendant had undertaken the duty of providing her with transportation;

or, as averred in the declaration, that "she was lawfully traveling" in its car.

The company, although engaged in the sale of automobiles, did not let them for hire and there seems to have been no substantial dispute, or the jury upon the aspect of the evidence most favorable to the plaintiff could have found, that one Martin, the "advertising manager" of a company publishing a paper in which the defendant advertised, had been requested by an employee, Edna A. Gilmore, to "obtain an automobile and driver for her to take her mother out to Medford for a certain purpose," and that in response to this request Martin telephoned to the office of the defendant company and requested that a touring car for her use be sent to the street and number of Miss Gilmore's house. The defendant, for the sole purpose of accommodating Martin, thereupon sent the car to the house and, after Miss Gilmore and her mother got in, they drove by Miss Gilmore's direction to the plaintiff's residence, where upon her invitation then or previously given the plaintiff, a fellow employee at the publishing company's office, joined them, when they proceeded to Medford. It was on the return trip that the collision occurred.

The burden of proof rested on the plaintiff to show that under the circumstances through which she had become an occupant of the car the defendant undertook to exercise reasonable care to protect her from injury during the journey. If the car and driver were lent to Martin for his own use or the use of his friends, the plaintiff cannot recover. The defendant had no interest in the purposes or undertaking for which Martin had requested and obtained the loan of the car. It only permitted him to use the car for his own accommodation. *Herlihy v. Smith*, 116 Mass. 265, 266. The evidence fails to show any contract for hire or in payment of any services of Martin in the past, or to be rendered in the future.

But even if his request was complied with in order to retain his good will, or in recognition of past favors from him personally, or in the hope of future favors from the publishing company, or in expectation that if his friends desired to purchase a car he would recommend the defendant's automobiles, the service which the defendant undertook was to transport the persons named within the limits already described. It is settled that the extent to

which property which is the subject of bailment can be used by the bailee must be determined by the contract. *Perham v. Coney*, 117 Mass. 102. *United Shoe Machinery Co. v. Holt*, 185 Mass. 97. *Carlidge v. Sloan*, 124 Ala. 596, 602. *DeVoin v. Michigan Lumber Co.* 64 Wis. 616. *Felton v. Deall*, 22 Vt. 170. *Bryant v. Wardell*, 2 Exch. 479. The car was furnished for the use of a particular person for a particular service, and, while its full use and enjoyment for that purpose was implied, the defendant did not contract for or assent to its use by the plaintiff, who at most was only a licensee to whom it owed no duty except to refrain from wanton and reckless acts on the part of its servant in driving the car, which are not charged in the declaration or shown by the evidence. *Freeman v. United Fruit Co.* 223 Mass. 300. *Walker v. Fuller*, 223 Mass. 566. *McColligan v. Pennsylvania Railroad*, 214 Penn. St. 229. *Felton v. Deall*, 22 Vt. 170. *Smith v. Bailey*, [1891] 2 Q. B. 403. 3 R. C. L. Bailments, § 32.

The request for instructions to the jury that "Upon all the evidence, the jury must find for this defendant" and "That there is no evidence for your consideration of negligence on the part of the defendant R. & L. Company" should have been given. The remaining exceptions in so far as not covered by what has been said need not be considered.

*Exceptions sustained.*

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JAMES E. HENCHEY vs. CHARLES E. RATHBUN.

Middlesex. March 13, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Landlord and Tenant*, Acceptance of lease. *Contract*, What constitutes.

At the expiration of a lease the landlord sent to the former lessee two originals of a new lease signed by him enclosed in a letter asking the former lessee to "sign one of the leases if correct." The former lessee, instead of signing and returning one of the duplicates, wrote to the landlord asking that an option of purchase might be inserted corresponding to a similar clause in the lease which had expired. After correspondence in which no change was agreed upon, the landlord notified the former lessee that he had decided not to renew the lease. Thereupon the former lessee sent back the duplicate of the lease executed with a check for the rent that had accrued according to the terms of the lease. The landlord replied

that the return of the lease was too late and that the check was credited to the sender on his account as a tenant at sufferance. The former lessee then stated that he had signed the duplicate of the lease soon after receiving it and had retained it awaiting the reply to his proposal to insert an option of purchase clause. In a summary process for possession of the premises brought by a new lessee against the former lessee still in possession, it was *held*, that there was no evidence for the jury of an acceptance of the lease by the defendant and that judgment must be ordered for the plaintiff.

In the case above stated the jury found, in answer to a special question submitted to them, that the former lessee signed the new lease with the intention of accepting it before he received the landlord's letter of withdrawal, and it was *held* that the act of signing when not communicated to the landlord could not be found to be an acceptance of the lease, and that the former lessee's secret purpose to obtain an option if he could and, if he failed to obtain it, to take what was offered could not be made the basis of an enforceable contract.

In the same case it was *held* that the duplicate original of the new lease signed by the landlord only, being an incomplete instrument, could not have the effect of a deed poll.

SUMMARY PROCESS under R. L. c. 181 for the possession of certain land in Woburn. Writ in the Fourth District Court of Eastern Middlesex dated October 15, 1915.

On appeal to the Superior Court the case was tried before *Stevens, J.* The evidence is described in the opinion. At the close of the evidence the judge submitted to the jury the two following questions:

"1. Did the defendant accept the lease from Edmund Reardon [the owner of the land] dated June 1, 1915, with the understanding that it was in force before he received the letter from Reardon dated August 2, 1915, but said to have been mailed August 11, 1915?

"2. Did the defendant execute the lease from Edmund Reardon dated June 1, 1915, with the understanding that it was in force before he received the letter from Reardon dated August 2, 1915, but said to have been mailed August 11, 1915?"

To each of these questions the jury answered "Yes." Thereupon the judge ordered a verdict for the defendant, and with the consent of the parties reported the case for determination by this court.

*F. J. Carney*, for the plaintiff.

*H. P. Johnson*, for the defendant.

BRALEY, J. The defendant at the date of the lease upon which the plaintiff relies was in occupation of the premises, but whether

as a tenant at sufferance or under a lease prior in time from one Reardon, the common landlord of the parties hereafter referred to as the lessor, is the principal question for determination. If the defendant has the older title, the plaintiff fails to establish a present right of entry and ejectment cannot be maintained. *Page v. Dwight*, 170 Mass. 29. *Bradshaw v. Ashley*, 180 U. S. 59.

It was undisputed that, being an occupant under a lease the term of which had expired, the defendant remained in possession while negotiations were pending for a further lease of the premises. The lessor, whose testimony was uncontradicted, stated that after an understanding had been reached "he drew up two signed copies of a lease and sent them to the defendant with a letter" requesting him to "sign one of the leases if correct . . ." But, instead of accepting, signing and returning the duplicate, the defendant by letter asked that an option of purchase be inserted corresponding with a similar clause in the lease which had expired. A cross proposal however is not an acceptance. It does not of itself constitute a contract, as the parties were not in accord and no final agreement had been consummated. It is plain under the circumstances that delivery by the lessor depended upon the defendant's acceptance, to be shown by his signature and return of the duplicate, and that the lessor until acceptance had the right to withdraw from the proposed contract. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 391, 395.

The parties after some correspondence never having agreed upon any change in the instrument as drafted, the lessor notified the defendant that he had decided not to renew, and thereupon the defendant replied by returning the duplicate duly executed, with a check for the rent which by the terms of the lease had accrued. By the correspondence which immediately followed the lessor informed the defendant "that the return of the lease is too late and that your check is credited your account as tenant on sufferance," and the defendant in reply notified the lessor that the lease "was signed within a few days after being received and then held awaiting your reply to my letter as to having the buying option clause inserted. The fact that your lease was in my possession doesn't give you any grounds for your back water. And I shall hold you to it and expect your fulfilment as you do of me."

The notification, coupled with the execution and return of the

duplicate, apparently led the trial judge, subject to the plaintiff's exceptions, to submit to the jury the questions, whether the defendant accepted the lease with the understanding that it was in force before he received the letter of withdrawal, and whether the defendant executed the lease with the understanding that it was in force before he received the letter of withdrawal, which having been answered in the affirmative, a verdict for the defendant was ordered. But acts not communicated to the other party are insufficient to constitute an acceptance, and the secret designs or purposes of the defendant to obtain the option if he could, and upon failure to obtain it then to take what had been offered, cannot be made the basis of an enforceable contract where the contract is conditioned to take effect upon a mutual understanding and agreement. *Stoddard v. Ham*, 129 Mass. 383, 385. *O'Donnell v. Clinton*, 145 Mass. 461, 463. *Madden v. Boston*, 177 Mass. 350. Nor could the incompleted instrument have the effect of a deed poll binding the lessor. No estate had vested under it in the defendant, who is not shown to have occupied under a lease defectively executed as in *Codman v. Hall*, 9 Allen, 335, and *Carroll v. St. John's Society*, 125 Mass. 565, 566.

It follows that the jury should have been thus instructed; and by the terms of the report judgment must be entered for the plaintiff.

*So ordered.*

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ISRAEL NESSON & another vs. FRANKLIN H. GILSON.

Suffolk. March 14, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, & DE COURCY, JJ.

*Equity Jurisdiction*, To enjoin enforcement of judgment at law. *Equity Pleading and Practice*, Master's report: exceptions, motion to recommit.

A court of equity has no supervisory jurisdiction over courts at law.

In a suit in equity brought to restrain the enforcement of a judgment at law, which was entered after two trials on the merits and after the merits had been considered for a third time on a petition for a writ of review, which was denied, where the only new matter alleged in the bill was disposed of completely by the findings of a master and was shown to be without foundation, it was ordered that the bill be dismissed with costs.

In a suit in equity exceptions to a master's report based on objections that certain findings of the master were not warranted by the evidence or that certain findings were not made by the master, if the evidence on which the master acted is not reported, must be overruled.

A motion in a suit in equity to recommit a master's report, in order that he may report the evidence that was given in previous trials at law between the same parties and may make findings on questions that were decided or involved in those trials and are not material to the suit in equity, must be denied.

DE COURCY, J. In 1899 a promissory note for \$13,000, secured by a mortgage upon real estate, was given by the plaintiff Israel Nesson to Mary E. Walker, now deceased. At a foreclosure sale of the mortgaged premises in 1904, the property was bid in on account of the mortgagee for \$10,000. After the death of Mrs. Walker, the defendant Gilson, as administrator of her estate, brought an action for the balance due upon the note. Nesson's defence in substance was that Mrs. Walker had agreed to take the property for the amount of the mortgage, that a friendly foreclosure accordingly took place and that Mrs. Walker's failure to bid the full amount of the mortgage was a breach of her agreement.

The action was heard by a judge of the Superior Court in 1907, who made a finding for the plaintiff, and later denied a motion for a new trial. Exceptions filed by Nesson were sustained by this court on the ground that there was some evidence of a consideration for the alleged agreement. *Gilson v. Nesson*, 198 Mass. 598.

A second trial was had before another judge of the Superior Court, in 1910, and again the finding was for the plaintiff. Nesson's exceptions taken at that trial were overruled by this court in 1911. *Gilson v. Nesson*, 208 Mass. 368.

In March, 1911, judgment was entered on the finding. Later Nesson filed a petition for a writ of review; and this was heard upon the merits by a third judge of the Superior Court and was denied. Other litigation between the parties, growing out of the same controversy, need not be recited.

The present suit in equity \* was brought to restrain the enforcement of the judgment described above. The allegations of the bill, so far as material, relate mostly to facts and evidence already considered at the trials on the merits and no longer open.

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\* The suit was brought in the Supreme Judicial Court and was reserved by *Braley, J.*, for determination by the full court.



The only ground on which the bill could have any standing in equity is that set forth in the paragraph numbered twenty-six A. Therein the plaintiff alleges that the defendant Gilson, conspiring with four other persons named, "caused and procured the said Millen and Ballou to offer false testimony at the hearing in said cause, in consequence of which a judgment was entered therein against this plaintiff."

While there are cases where a court of equity upon proper application will enjoin a party from enforcing a judgment which he has obtained by means of fraud (see *Edson v. Edson*, 108 Mass. 590; *Brooks v. Twitchell*, 182 Mass. 443; 23 Cyc. 1022 *et seq.*), the fact that the prevailing party knowingly gave or procured false testimony upon a material issue ordinarily is not ground for such equitable interference. *Zeillin v. Zeillin*, 202 Mass. 205; 23 L. R. A. (N. S.) 564 note. Even assuming that Millen testified falsely at the second trial, the plaintiff's allegations in paragraph twenty-six A are disposed of by the findings of the master that there was no such conspiracy, that the defendant acted honestly and in good faith and that the charges of misconduct on the part of Mr. Schulz were unfounded. And there is no allegation or proof of fraud extrinsic to the trial, as distinguished from perjury in the trial itself, such as might entitle a plaintiff to relief. *Keyes v. Brackett*, 187 Mass. 306.

The exceptions to the master's report are based on objections that certain findings were not warranted by the evidence or that other findings were not made. As the evidence on which the master acted is not reported, these must be overruled. *Cook v. Scheffreen*, 215 Mass. 444.

The motion to recommit must be denied. It asks for a report of the evidence at the hearings in the Superior Court and before the master and for findings upon questions that were decided or involved in the trial on the merits or that are not material to this bill in equity.

What the plaintiff really seeks is a reopening of the original case. But a court of equity has no supervisory jurisdiction over courts of law; and the plaintiff, by trials on the merits and on the petition for review in the proper forum, has had ample opportunity to present his defence. He has had his day in court, the issues have been decided against him and he cannot litigate

them anew. *United States v. Throckmorton*, 98 U. S. 61. *Marvel v. Cobb*, 219 Mass. 458.

The master's report is confirmed, and the bill dismissed, with costs.

*Decree accordingly.*

*I. Nesson, pro se*, submitted a brief.

*C. A. Bunker*, for the defendant.

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PHILIP DEXTER, trustee, *vs.* ATTORNEY GENERAL & others.

Suffolk. March 15, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Devise and Legacy. Words, "Then be living."*

A testatrix by her will left the residue of her estate in trust to pay the net income to her mother, sister and brother during their joint lives, "And upon the death of the last survivor, the said income is to be added to the principal to be allowed to accumulate, and the whole trust fund then to be paid over in proportionate shares to my grand-nephews and grand-nieces, if any, who may then be living, as they shall arrive respectively at the age of twenty-one years; and if none living to take the same, then to pay over and distribute the whole" of the residue among charitable institutions. At the time of the death of the last survivor of the three joint beneficiaries for life, there were living a grand-nephew and a grand-niece of the testatrix, children of a deceased nephew, and also a niece of the testatrix who was married. *Held*, that the words "then be living" referred to the grand-nephews and grand-nieces of the testatrix alive at the death of the last survivor of the life beneficiaries and that the gift then vested in them, although possession was postponed until they should arrive respectively at the age of twenty-one years; and accordingly it was ordered that upon their respective arrivals at that age an equal distribution of the fund should be made to the grand-nephew, the grand-niece and to any issue of the married niece of the testatrix who might be born within nine months after the death of the last survivor of the life beneficiaries.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 7, 1916, by the trustee under the will of Martha Parsons, late of Milton, who died on May 15, 1899, for instructions as to the distribution of the trust fund to be made by reason of the death on November 5, 1915, of the last survivor of the mother, sister and brother of the testatrix to whom the net income of such fund had been payable during their joint lives.

The case came on to be heard before *Loring, J.*, who reserved it upon the bill and answers for determination by the full court.

*W. R. Trask*, for the plaintiff, stated the case.

*W. H. Hitchcock*, Assistant Attorney General, for the Attorney General.

*R. Homans*, for Royall Parsons and for himself as guardian *ad litem*.

*B. L. Young*, for the executors of the will of Arthur Jeffrey Parsons.

*A. G. Grant*, for the executors of the will of Georgiana Parsons.

*M. Donald*, for Gwladys C. Hopkins, administratrix, and Georgiana Musgrave.

*A. H. Brooks*, guardian *ad litem* for Mark Hopkins and Gwladys C. Hopkins.

*F. B. Greenhalge*, guardian *ad litem* for the unborn or unascertained issue of Georgiana Musgrave.

**BRALEY, J.** The testatrix after devising her real property either in fee or upon certain trusts and making gifts of pecuniary legacies under the sixth clause of her will, where she states that the will is to operate not only on the "remainder of my property and estate of every description," but "including all which I may be in any manner entitled to dispose of, or may be authorized to exercise any power of appointment over, by virtue of any will, deed of trust, settlement of any annuity or other instrument me enabling, or however otherwise," declared in the sixteenth clause, "All the rest, residue and remainder of my estate, including all over which I have any right of disposal as above, I dispose of as follows: The trustees under my will are to divide and pay over the whole net income thereof equally between my mother, my sister Georgiana, and my brother Jeffrey and the survivors and the last survivor of them for and during their natural lives, such payment to be made them annually at such time as may be most convenient. And upon the death of the last survivor, the said income is to be added to the principal to be allowed to accumulate, and the whole trust fund then to be paid over in proportionate shares to my grand-nephews and grand-nieces, if any, who may then be living, as they shall arrive respectively at the age of twenty-one years; and if none living to take the same, then to pay over and distribute the whole rest, residue and remainder of my whole estate

to and among such charitable institutions in New England as they, the trustees, may select & judge to be the most beneficent and useful, especially preferring, but therein, however, acting at their own sole discretion, such as are for the benefit of children." The codicils changing the legacies and certain devises of real estate do not affect these provisions. The last life tenant having deceased, at whose death a grand-niece and grand-nephew of the testatrix were living, the question is, whether they are entitled to share in the trust fund, or whether the gift is limited to the children of the two nephews and one niece who were living when the testatrix died, or whether the appointment by the testatrix under the power given in the will of her father is void for remoteness, and, if held void, whether the fund should be distributed under the residuary clause of his will in equal shares among the legal representatives of a daughter and grandson of the testator, the survivors of the four children for whom the residuary provisions were made, or whether the clause should be construed as meaning a gift in favor of the grand-nephews and grand-nieces who are living when the first grand-nephew or grand-niece reaches the age of twenty-one, under which construction the gift is void for remoteness, the charity fails, and, a partial intestacy resulting, the heirs at law of the testatrix take the entire property which would include her own property and the property over which she was given the power of appointment.

While the testatrix intended to exercise and did exercise the power, the property vested under the will of the donor of the power. *Raymond v. Commonwealth*, 192 Mass. 486, 490. But whether by the terms of the power it could be exercised at a period exceeding the limits of the rule against perpetuities, and therefore no part of the donor's property passed, need not be decided.

The life tenants were living not only at her death but at the death of her father, and from the language used by the testatrix, it is manifest she intended that her grand-nieces and grand-nephews living at a certain time should take the residue of her estate. A grand-niece and a grand-nephew were living when the last life tenant died, and where there is a gift to a class the estate vests whenever a member of the class comes within the description. *Fosdick v. Fosdick*, 6 Allen, 41, 43, 44. The words "then be living" refer to the grand-nephews and grand-nieces alive at "the death of the last

survivor," and are descriptive of the class who are to take, *Sears v. Russell*, 8 Gray, 86, *Thomson v. Ludington*, 104 Mass. 193, *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35, and are not used as defining the time when they should come into enjoyment of the property. *Ball v. Holland*, 189 Mass. 369, 372.

The gift accordingly vested, although possession is postponed until they arrive respectively at the age of twenty-one years, which measures the period of accumulation, but imposes no unlawful restraints on alienation. *Claflin v. Claflin*, 149 Mass. 19.

The result is that Mark Hopkins and Gwladys Hopkins, the children of a deceased nephew, being the only grand-nephew and grand-niece of the testatrix living at the termination of the life estates; and any issue of Georgiana Musgrave, a niece of the testatrix, born within nine months after the death of the last life tenant, are to share the fund, a proportionate distribution of which with the accumulated income is to be made whenever a distributee arrives at the age of twenty-one years. *Hubbard v. Lloyd*, 6 Cush. 522. *Hall v. Hancock*, 15 Pick. 255.

*Decree accordingly.*

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JOHN C. HURTER & another vs. CHARLES M. LARRABEE  
& others.

Suffolk. March 16, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, & DE COURCY, JJ.

*Partnership. Equity Jurisdiction, Accounting between partners.*

On a bill for an accounting brought by two retiring partners against the three remaining partners who were to continue the business formerly carried on by the firm, it appeared that there had been no bad faith on the part of any of the partners but that the bookkeeping and accounting had been done under a somewhat complicated system and were full of mistakes and errors resulting apparently from lack of care and diligence, and that all the partners, (including one who by common consent in addition to having charge of a special department exercised a general oversight of the conduct of the business and of the office, the bookkeeping and the accounting,) believed the business to have been prosperous and were deceived as to its real condition until this was revealed by the report of an expert accountant. A master, to whom the case was referred

"to state the accounts in accordance with the terms of the partnership," refused to make a finding as to negligence of the overseeing partner, although there was some evidence tending to show that such partner ought to have known that the books were kept badly and exhibited defects and errors. *Held*, that the refusal was proper, as the negligence of one partner had no bearing on the questions to be determined, and that under the circumstances disclosed the only course open to the master was to correct the errors so far as possible and from all credible evidence ascertain the true condition of the partnership.

So far as losses result to a partnership from errors of judgment of one partner not amounting to fraud, bad faith or reckless disregard of his obligations, they must be borne by the partnership.

In the case above stated it appeared that the termination of the partnership took effect on the first day of January of a certain year, and it was *held* that the taxes assessed upon the partnership property as of the preceding first day of April were expenses to be borne wholly by the partnership, there being nothing in the partnership agreement indicating any apportionment of such taxes between the firm and the continuing partners.

In the same case it was *held* that the expense of the expert accountant employed to examine and report on the books of the firm was charged rightly to the partnership, the results of his work being equally available to all the partners.

RUGG, C. J. This is a bill for an accounting by two retiring members of a partnership against three remaining general partners, who hereafter will be referred to as the defendants. The firm carried on a wholesale dry goods business of considerable magnitude. The articles of copartnership provided, among other matters, that upon the termination of the partnership two or more of the general partners having a majority interest therein might continue the business under the firm name, and in that event should "pay to the retiring general partners, for their interest in said business, the amount standing to the credit of each of the retiring general partners on the books of the firm January 1, 1913, after the stock taking of that date, and after the interest and profit has been placed to each general partner's credit." The three defendants elected to continue the business, and the two plaintiffs, to retire. Disagreement as to how much should be paid to the plaintiffs caused this suit. The case was referred to a master under a rule which required him "to state the accounts in accordance with the terms of the partnership." Exceptions to the master's report present the questions to be decided.\* There has been no bad faith on the part of any of the partners.

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\* The case was brought in the Supreme Judicial Court. *Crosby, J.*, made an interlocutory decree overruling the exceptions to the master's report,

The plaintiffs' first exception is to the refusal of the master to make a finding upon the negligence of the defendant Brady in supervising the accounting department of the firm. The duties of the several partners were not defined by the partnership articles, but by common consent Brady, in addition to having charge of a special department, exercised a general oversight of the conduct of the business and of the office and bookkeeping and accounting department. But the bookkeeping was in charge of one Ferguson until just before the dissolution of the partnership, when he left. Ferguson was generally trusted by all the parties. But the bookkeeping and accounting was done on a rather complicated system and was found to be full of mistakes and errors, resulting apparently from lack of care and diligence. All the partners, including Brady, believed the business to have been prosperous and were deceived as to its real condition until it was revealed by the report of an expert accountant. The master refused to make a finding as to the negligence of Brady because, although there was some evidence tending to show that he ought to have known that the books were badly kept and exhibited defects and errors, there were other facts which made that question irrelevant. The relation of Larrabee and Chandler, the other defendants, is the same as that of the plaintiffs to the books. They ought not to be made to pay to the plaintiffs for Brady's negligence. Moreover, the main duty of the master was to ascertain the actual facts as to the assets and liabilities of the firm at its dissolution, so far as these could be determined with reasonable certainty from the books of the firm. Negligence of one partner had no bearing on this issue. The basis of the accounting fixed by the agreement is the share of each partner, after interest and profit of each is found, as shown by the books. There is no general principle of partnership which renders one partner liable to his copartners for his honest mistakes. So far as losses result to a firm from errors of judgment of one partner not amounting to fraud, bad faith or reckless disregard of his obligations, they must be borne by the partnership. Each partner owes to the firm the duty of faithful service according to the best of his ability.

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and later by his order a final decree was entered. The plaintiffs appealed from both the interlocutory and the final decree.

But, in the absence of special agreement, no partner guarantees his own capacity. Where one assumes the duty of keeping the books, reasonable presumptions are made against him when he disputes their accuracy. But when there is good faith throughout, he is not estopped to show the truth about the books even though he may have been inefficient. *Knipe v. Livingston*, 209 Penn. St. 49. *Knapp v. Edwards*, 57 Wis. 191. *Exchange Bank of Leon v. Gardner*, 104 Iowa, 176. *Paterson v. Burton*, 3 Harr. (N. J.) 526. Cases like *Hutchins v. Page*, 204 Mass. 284, *Costa v. Costa*, 222 Mass. 280, and *Wiggins v. Brand*, 202 Mass. 141, are not applicable for the reason that either something more than or different from mere negligence was involved, or the partners were not on an equal footing.

The basis of settlement established by the partnership articles in the present case was what was shown by the books of the partnership. But this means a set of books which was a reasonably correct representation of the firm's affairs. It did not mean books so full of palpable mistakes and grave errors as to be manifestly untrustworthy and incapable of showing justly the affairs of the firm. Under the circumstances disclosed, the only course open was to correct the errors so far as possible, and from all credible evidence ascertain the true condition of the firm. This was the course pursued by the master.

There was no error in the finding as to the cash on hand on December 31, 1912. There was a considerable discrepancy between the cash shown on the books and the actual amount. As to this matter, the master found that "There is no evidence in the case that the defendants have received any benefit from the loss in cash, if there was a loss, and I find, as asked by the defendant, 'that the weight of the evidence is in favor of adopting the actual cash on hand as ascertained by Mr. Albee's [the expert accountant's] count rather than the showing of a blundering cash account, and that it is fair to assume that a full and minute investigation of all pertinent entries in the books would discover errors sufficient to account for the shortage.' Mr. Albee was of the opinion, and I think he was right, that an investigation sufficient to make the audit complete would not be warranted by the amount involved." The reasonableness of this finding is its complete support. If the books could not be relied on in this re-



spect, the only thing to do was to take the best evidence available as to the true state of the account.

In general the same principles were followed in determining what the books really showed, after making corrections for errors, as to merchandise and accounts receivable. For the same reasons no error is shown in this respect.

The taxes assessed as of April 1, 1912, rightly belonged to the firm to pay. The taxes were assessed on its property and naturally were an expense wholly to be borne by it. There is nothing in the partnership articles expressly or impliedly indicating any division of the charge for taxes between the firm and the continuing partners. The case at bar is quite different from *J. L. Hammett Co. v. Alfred Peats Co.* 217 Mass. 520.

The portion of expense of the accountant charged to the firm affords no ground for exception. This work was necessary in order to find an approximation to the real state of the partnership. The results of his work were equally available to all the partners. It was done for the firm as a whole and rightly was charged to it.

Exceptions numbered two, seven, ten and thirteen have been waived, and what has been said shows that no error was committed in overruling the others.

*Decree affirmed with costs.*

*R. G. Dodge, (H. S. Davis & F. K. Linscott with him,) for the plaintiffs.*

*G. L. Mayberry, (W. M. Morgan with him,) for the defendants.*



CHARLES CONKLIN vs. JOHN HOWARD INDUSTRIAL HOME.

Suffolk. March 16, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Witness, Cross-examination, Direct examination. Practice, Civil, Control of cross-examination by judge. Charity. Corporation, Charitable.*

Where, in an action of tort against a corporation for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant in a wood yard operated by it, the defendant in its answer alleges that it is a charitable cor-

poration and that the wood yard was operated by it in carrying out its charitable purposes, and at the trial the plaintiff calls as a witness the superintendent of the defendant, who was one of its incorporators, and makes inquiry as to the general management of the defendant's enterprises, the witness in cross-examination by counsel for the defendant may be permitted to state the purposes for which the wood yard was established and maintained.

And, where it does not appear that the superintendent, although an employee and a member of the corporation, had shown bias or prejudice in his testimony, the presiding judge was held properly to have ruled that the plaintiff, who had called him as a witness, should not be permitted to cross-examine him.

A charitable corporation, organized "for the purpose of assisting discharged prisoners and others," by furnishing them with a temporary home and employment, to lead honest and useful lives, which maintains for its purposes a lodging and boarding house called a Home, and a wood yard where employment is given to persons needing its help, who are paid something for their work and are given lodging, board and sometimes clothing, and the expenses of which corporation are paid in part from a sale of the wood from the wood yard, in part from the income from invested funds and in part from voluntary contributions, the corporation deriving no profit from its enterprises, cannot be held liable in an action of tort brought by an inmate of its Home and a worker in its wood yard for personal injuries received by him due to a defective condition of a wood chopping machine of which the defendant's superintendent knew or should have known.

TORT for personal injuries alleged to have been received by the plaintiff, while in the employ of the defendant, by reason of an alleged defective condition of a wood chopping machine at which he was set at work without adequate instruction or warning.  
Writ dated April 25, 1914.

The answer of the defendant as amended, besides containing a general denial, alleged that it was incorporated in the year 1896 under the provisions of Pub. Sts. c. 115, § 4, and the acts in amendment thereof and in addition thereto, "for the purpose of assisting discharged prisoners and others, by furnishing them with a temporary home and employment, to lead honest and useful lives;" that it was a charitable corporation and not a business corporation, and had "engaged in the work of helping those who have been convicted of crime and have served terms of imprisonment to lead them to become honest and useful citizens; that, solely for the purpose of carrying out the charitable objects set forth in its charter of incorporation and not for any private profit of its members or any of them, the defendant maintained at the time of the accident to the plaintiff a Home for discharged prisoners, and in connection with the Home, in order better to assist such discharged prisoners, a wood yard known as the Brookline

Industrial Wood Yard, and that such Home and wood yard were maintained in part by voluntary contributions from the public."

The case was tried before *Raymond, J.*

The superintendent of the defendant, called as a witness by the plaintiff, testified in direct examination: "It is not stipulated when a man comes to the Home as a member that they should get any wages. It is only our pleasure that we allow them to have it. We pay wages, however, from \$1.75 to \$2 a week with the board and lodging and clothes now and then as it comes in. They do not work in the wood yard in Brookline altogether, a great many of them work in the yard in Brookline. The men don't sleep in Brookline, they sleep at 560 Massachusetts Avenue, Boston; we pay their carfare out and in, and wood that they saw and chop we sell to the public, the wood being sawed and chopped in Brookline by the men."

In cross-examination the superintendent testified that the wood yard was maintained by the defendant "to give the men employment and to give them an opportunity to save a little money so when they do get employment elsewhere they will have something to stay them over;" that it was not operated entirely by inmates of the Home on Massachusetts Avenue, the manager not being an inmate, but that he was the only one that was not in the Home; that the proceeds of the wood sold at the wood yard after the expenses of running the wood yard had been paid, if any proceeds were left, were turned over to the Home in order to defray a part of the expenses; that it, the Home, had some invested funds, the income of those invested funds going for the same purpose; that the income from the funds and the receipts from the wood yard together did not meet the expenses of the Home within \$6,000 or \$7,000, and that the balance of the Home expenses was met by contributions from the public.

*E. M. Shanley*, for the plaintiff.

*H. W. Brown*, for the defendant.

*BRALEY, J.* While the only evidence introduced by the defendant was a certified copy of its charter showing that it is a corporation organized under Pub. Sts. c. 115, § 4 for the purpose of assisting discharged prisoners and others by providing them "with a temporary home and employment, to lead honest and useful lives," the plaintiff called the superintendent of the Home,

one of the incorporators as a witness. It is upon his evidence that the question of the defendant's liability must be decided.

The plaintiff having inquired as to the number of corporators and the general management of the Home in the reception, support and employment of inmates, the superintendent was properly permitted to state on cross-examination the purpose for which the wood yard where the plaintiff, an inmate, while at work with a chopping machine was injured, had been established and maintained. *Hartnett v. Goddard*, 176 Mass. 326, 331.

Nor is the ruling that the plaintiff could not cross-examine his own witness to prove that the defendant was not a charitable organization reviewable on exceptions where no bias or prejudice of the witness is shown. *Jennings v. Rooney*, 183 Mass. 577. *Reed v. Mattapan Deposit & Trust Co.* 198 Mass. 306, 312.

It clearly appears from his uncontradicted testimony, that pursuant to the charter the Home maintained the wood yard to provide employment for the men, and to enable them "to save a little money so when they do get employment elsewhere they will have something to stay them over," and that, the income from invested funds and receipts from the wood yard being insufficient to meet expenses, the deficit is supplied by contributions from the public.

The wood yard having been operated as a part of the defendant's charitable work for the benefit of the inmates and not for commercial gain or profit, the verdict for the defendant was rightly ordered. *Farrigan v. Pevear*, 193 Mass. 147, and cases cited. *Thornton v. Franklin Square House*, 200 Mass. 465. And whether there was evidence for the jury of the plaintiff's due care and the alleged negligence of the defendant need not be considered.

*Exceptions overruled.*

ROBERT M. PIERCE vs. ELIHU G. LOOMIS & another, executors.

Middlesex. March 16, 17, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Devise and Legacy.*

In an action under R. L. c. 141, § 19, against the executors of the will of the plaintiff's father for a legacy of \$100,000, it appeared that the clause of the will under which the plaintiff claimed the legacy was as follows: "To my son [the plaintiff] . . . I give and bequeath the sum of \$100,000 out of which bequest are to be first paid all notes signed or endorsed by him and owned by me at the time of my decease, with interest; also all notes signed or endorsed by the Languages Printing Company of New Jersey and owned by me at the time of my decease, with interest; and also all notes signed or endorsed either by said [the plaintiff] or by said Languages Printing Company of New Jersey and held in trust for me at the time of my decease, with interest. Upon settlement of said bequest the balance if any above said indebtedness is to be paid to my said son in money." The executors in defence put in evidence an unpaid note of the Languages Printing Company for \$100,000 indorsed by the plaintiff and payable to a trustee for the testator. The plaintiff offered to prove that the note had been extinguished by a merger of the mortgage given to secure it, and also offered to show that the testator, when he made his will, knew of the mortgage and the merger and of other transactions that made the note legally unenforceable. The trial judge refused to admit the evidence offered and found for the defendants. *Held*, that the refusal and finding were right; that, although the debt of \$100,000 due from the printing company might not have been collectible, it was the testator's intention in spite of this fact that this loan should be treated as in the nature of an advancement to his son and that the balance only, if any, should be paid to him as a legacy.

BRALEY, J. By his will John H. Pierce, the father of the plaintiff, provided for his son as follows:

"To my son Robert Morris Pierce of the City of New York, I give and bequeath the sum of One Hundred Thousand dollars (\$100,000) out of which bequest are to be first paid all notes signed or endorsed by him and owned by me at the time of my decease, with interest; also all notes signed or endorsed by the Languages Printing Company of New Jersey and owned by me at the time of my decease, with interest; and also all notes signed or endorsed either by said Robert Morris Pierce or by said Languages Printing Company of New Jersey and held in trust for me at the time of my decease, with interest. Upon settlement of said be-

quest the balance if any above said indebtedness is to be paid to my said son in money."

The codicil to the will made no change in these provisions, and, more than a year having elapsed since the appointment and qualification of the executors; and the funds in their hands being more than sufficient to meet all charges of administration and to pay all pecuniary legacies, and demand therefor having been duly made and refused, the plaintiff sues in contract under R. L. c. 141, § 19, to recover the full amount of the legacy.\*

But the plaintiff, who has the burden of proof, cannot recover unless the legacy was absolutely due and payable at the beginning of the action. *Colwell v. Alger*, 5 Gray, 67. *Brooks v. Lynde*, 7 Allen, 64, 68. *Miles v. Boyden*, 3 Pick. 213, 218.

The language of the bequest is unambiguous. It is not an unconditional gift, and the defendants accordingly under their answer of a general denial were properly permitted to introduce in evidence the unpaid, outstanding promissory note of the Languages Printing Company, indorsed by the plaintiff and referred to in the previously quoted paragraph or clause of the will, which note held by a trustee for the testator being equal in amount to the legacy no part of the legacy was apparently due. *Bowes v. Christian*, 222 Mass. 359, 362. *Taylor v. Taylor*, 145 Mass. 239.

It was open to the plaintiff without filing a replication to introduce any competent evidence in avoidance of this defence. R. L. c. 173, § 31. *Lyon v. Manning*, 133 Mass. 439, 440. *Todd v. Bishop*, 136 Mass. 386, 393. And he contended under his first offer of proof, that before the testator's death the note had been extinguished by merger of the mortgage given to secure it with the equity of redemption; and by his second offer of proof; that "the security for the note introduced by the defendants was ample; that the payment, in return for which such note was given, is the only large payment made by the testator to or for the benefit of his son, the plaintiff; that, at present, there are held by Alonzo P. Weeks as trustee for John H. Pierce what purport to be three

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\* The case was heard by *Hall, J.*, without a jury. He found for the defendants; and the plaintiff alleged exceptions.

notes, for \$2,000, \$3,000 and \$5,000 respectively, signed by the Languages Printing Company and indorsed by Robert Morris Pierce; that these were held by said Weeks at the decease of John H. Pierce; that these notes had been expressly extinguished by the transfer of property in payment during the lifetime of John H. Pierce; that John H. Pierce himself held, at his death, a note for \$14,000 and some fraction by Robert Morris Pierce; that there have been no other notes which could come within the description of the paragraph of the will; and that all of these notes and the alleged \$100,000 note, as John H. Pierce knew, were in existence at the time that the will was drawn, although all those of the Languages Printing Company had been discharged before that time."

We are of opinion that the ruling excluding this evidence was right. The extent to which his son should share in the distribution of the estate must be determined by the testator's intention. While the debts specified are not to be collected, they were in the nature of advancements to be deducted, and it is the balance only, if any remains, which comes to him in money. *Taylor v. Taylor*, 145 Mass. 239. If under the offers of proof it is conceded that the testator knew of the merger and the other transactions referred to, and that the note had become unenforceable legally, he still chose with this knowledge to measure his bounty by the standard selected and with which by his express directions the plaintiff must comply. *Cummings v. Bramhall*, 120 Mass. 552, 561. *Sibley v. Maxwell*, 203 Mass. 94.

The purpose of the testator is further manifest by the clause immediately following the paragraph in question: "I have already paid to and for the benefit of my said son Robert Morris Pierce certain large sums which are not included in the indebtedness aforesaid and I have therefore granted to his sister Elsie Pierce a greater interest in my estate than to my said son."

The executors for the reasons stated not having been required to pay out of the general assets of the estate any of these notes, the further request that "in order to entitle the defendants to make any deduction from the \$100,000 before paying the same to the plaintiff, they must show that some note within the description of that clause of the will has been paid by them" was rightly

refused, and, the finding for the defendants having been warranted by the evidence, the exceptions must be overruled.

*So ordered.*

*J. Dewey*, for the plaintiff.

*A. E. Pillsbury*, (*H. B. Patrick* with him,) for the defendants.

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COMMONWEALTH vs. AUGUSTUS W. TURNER.

Suffolk. March 20, 1916. — May 19, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Abortion. Evidence*, Dying declarations, Testimony of accomplice. *Practice*, Criminal, Conduct of trial, New trial, Exceptions.

At the trial of an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, whose death resulted, a dying declaration made by the woman, offered in evidence under R. L. c. 175, § 65, is not rendered inadmissible by the fact that, at its close, with her right hand held raised, supported by one of her attending physicians, she repeated after another physician the words, "I say this realizing I am about to die and this is true, so help me God."

Contradictory statements, in a dying declaration by a woman under such circumstances, as to the name of the person responsible for her pregnancy affect the weight only and not the competency or admissibility of the declaration as evidence.

Where, at the trial of an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, whose death resulted, there is evidence tending to show that the woman made a dying declaration stating in substance that she, being pregnant, went to the office of a certain physician on "Massachusetts Avenue, near Symphony Hall" in Boston, that he used certain means to procure a miscarriage, that he sent her to a Mrs. H at a certain address, where he came on two subsequent days and curetted her; and where there also is testimony by her family physician and other medical experts to the effect that the condition which resulted in her death was caused by an abortion being committed when she was three or four months pregnant, and other evidence tending to show that the defendant's name is the same as that of the physician named in the dying declaration, that he had an office as a physician on "Massachusetts Avenue, near Symphony Hall" in Boston, that there was no other physician of his name practicing medicine in Boston, and that the woman afterwards was treated at the house of Mrs. H at the address mentioned in the dying declaration by a physician who had an office on Massachusetts Avenue within five hundred and fifty feet of Symphony Hall, a verdict of guilty is warranted.



And if, at such trial, Mrs. H, called by the Commonwealth, testifies in substance that she received the woman at her house in response to a telephone message from one who called himself "Dr. Turner that you spoke to a few months ago," that later that Dr. Turner afterwards called on the woman, that he had offices at two addresses, which she gave, and one of which was on "Massachusetts Avenue, near Symphony Hall," such testimony is admissible although in further direct examination the witness states that the Dr. Turner who called upon the woman was not the defendant and did not look like him, and that his name was Theodore W. Turner while the defendant's name was Augustus W. Turner.

The Commonwealth, at such trial, may introduce in evidence under R. L. c. 175, § 24, to impeach the credit of the witness Mrs. H as to some of her statements, evidence of statements made by her to various police officers immediately after the death of the woman to the effect that the doctor who called upon the woman at her home was named Augustus W. Turner and that he had an office at the address on Massachusetts Avenue near Symphony Hall, if, before the evidence of such statements is introduced, the circumstances under which they were made, sufficient to designate the particular occasions, have been mentioned to the witness and she has been asked if she made the statements and has been given an opportunity to explain them.

At such trial, testimony of a police officer is admissible to the effect that, four days after the alleged criminal act of the defendant and two days before the death of the woman, at a time when other evidence showed that the woman was at the house of Mrs. H, he saw Mrs. H and the defendant talking together on Massachusetts Avenue near the corner of Boylston Street in Boston.

In this case it was *held*, that, under the circumstances, the discretion of the presiding judge as to permitting the Commonwealth to cross-examine or lead the witness Mrs. H could not be said to have been exercised so as manifestly to have prejudiced the defendant.

At the trial above described, the jury were instructed that they should disregard all of Mrs. H's testimony unless they were satisfied beyond a reasonable doubt of the identity of the defendant as the Dr. Turner who called at her house when the woman was there; and a motion to have her entire testimony stricken out was held to have been denied rightly.

A woman, whose death has been caused by a criminal operation to procure a miscarriage, is not an accomplice to the crime although she voluntarily went to the person who performed the operation and paid him for doing it, and, at the trial of an indictment for the crime under R. L. c. 212, § 15, the defendant may be convicted upon evidence contained in a dying declaration of the woman introduced under R. L. c. 175, § 65, without the introduction of evidence in corroboration of her statements.

Where a motion for a new trial after a verdict of guilty upon an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, is based upon the ground of the wrongful admission of testimony of one of the witnesses of the Commonwealth, as to whom in his opening the prosecuting officer had stated that he anticipated "difficulty in getting the truth from this woman," and on the ground that, in his closing argument, the same officer had referred to the same witness as "an abortionist nurse," the determination of the question, whether the motion shall be granted, lies

wholly in the discretion of the presiding judge, and his denial of it cannot be reversed upon exceptions.

INDICTMENT, found and returned on January 9, 1915, charging that the defendant on January 1, 1915, "with intent to procure the miscarriage of one Irene A. Richardson, did unlawfully use some unlawful means to said jurors unknown with said intent; and that in consequence of the use by him . . . of said unlawful means . . . the said Irene A. Richardson died."

The case was tried before *Callahan, J.* During the opening statement to the jury by the Commonwealth, the presiding judge said to the jury, "I will say to the jury that anything said by counsel in opening statement is not to be regarded by them as evidence and is to have no effect whatever upon their minds until it is made good by evidence subsequently introduced, and that I state to you, gentlemen." Later, in the course of the opening, the prosecuting officer stated, without objection being made by the defendant, "Now, gentlemen, we will call the nurse and put her on the stand in the course of the trial, and the government anticipates difficulty in getting the truth from this woman. However, what I am saying is not going to make evidence in this case, it is what you hear on the witness stand and what you see take place there; but that is what we contend."

There was evidence tending to show the following facts:

At about six o'clock in the evening of January 6, 1915, Irene A. Richardson sent for her sister to come to the apartment of one Marie Hansen, numbered 282 on Massachusetts Avenue in Cambridge, and take her to her home in Arlington. When she arrived at her home she was in a feeble condition. She at once was attended there by Dr. Harold R. Webb, the physician of her family, who found her in so dangerous a condition that under his advice she was removed to a hospital. At the hospital a consultation as to her condition was held between Dr. Webb and Dr. Edward P. Stickney, both of whom were of opinion that she had been pregnant three or four months, that an abortion had been performed upon her some days before and that her condition then was critical from septicaemia. An operation was performed about one o'clock in the morning of January 7, but it soon became apparent that she could not live.

At about ten o'clock in the morning of January 7, both physicians

informed her that she was about to die. Her mind was clear and she stated that she understood the fact of her approaching death and that a statement that she was about to make probably would be her last statement.

She then made a statement to the physicians and the matron of the hospital, in which she at first named a certain man as responsible for her pregnancy. Her attention being called to the fact that she was naming a different man than one whom she previously had named, and she being asked, "Do you realize your condition and the necessity for absolute truthfulness, and do you wish to change all the statements you have made?" she said, "Yes," and named a different man, who, she said, gave her \$30 to have the abortion performed "and I supplied the rest. . . . I paid Dr. Turner \$60. . . . I am now telling the truth. I did not tell the truth before about" who was responsible for the pregnancy. "I went to Boston last Friday [January 1] to the office of A. W. Turner, Massachusetts Avenue, near Symphony Hall. I saw him first there. He put a red tube up inside of me. Then he sent me to Mrs. Hansen, 282 Massachusetts Avenue, Cambridge. I went to bed, had pain and began to flow. Dr. Turner came on Sunday and curetted me, he curetted me again on Monday and again on Tuesday. I got up on Wednesday and telephoned home, and Ethel [her sister] came to this house, 282 Massachusetts Avenue, Cambridge, for me. . . . Mrs. Hansen wasn't in the room when Dr. Turner curetted me . . . I say this realizing that I am about to die." Her right hand then held raised, supported at the elbow by Dr. Webb, she repeated after Dr. Stickney these words, "I say this realizing I am about to die, and this is true, so help me God."

There was other medical testimony confirming the opinions stated by Dr. Webb and Dr. Stickney.

Marie Hansen was called as a witness by the Commonwealth. She stated that a Dr. Turner called her on the telephone on the afternoon of Monday, January 4, and said, "I am Dr. Turner that you spoke to a few months ago," and asked her if she had any rooms vacant; that she responded in the affirmative and he said, "I am sending over a girl roomer. Would you take care of her until I see you?" to which she said, "Yes;" that later on the same day Irene A. Richardson came; that during the time she was

at the house of the witness she seemed sick; that on Tuesday a man came to see the girl, and the witness said, "Is this Dr. Turner?" and he replied, "Yes. T. W. Turner — Theodore Turner." She further testified that no one else than that man saw the girl while she was at the house and that he was not the defendant and did not look like the defendant; that he was the same man who spoke with her on the telephone and whom she had seen two months before in his office in the Hotel Pelham at the corner of Boylston Street and Tremont Street, and whom she had been to in the same office about five years before; that she also had been to the Hotel Pelham since the death of the girl with Chief Urquhart of the police department of Arlington and Captain Hurley of the police department of Cambridge and Inspector Linton of the police department of Boston, and had pointed out to them an office which she said "looked like the place," and that that office had upon it a sign reading, "Chemico Electric Company, Dr. A. W. Turner." She further testified that the Dr. Turner who called on the girl stayed only five minutes each time and that she did not know that he "was treating her as a doctor."

In order to impeach the testimony of the witness Hansen as to the defendant not being the Dr. Turner who called upon the girl at the house of the witness, and as to other material details, the prosecuting officer recalled to her the circumstances of interviews between her and various police officers and to her testimony at a previous trial, read from her statements made on such occasions and asked her if she had made them. She denied that she had made statements to the police officers that the man who called upon Irene A. Richardson was Dr. Augustus W. Turner. She also denied that she made others of the statements, could not remember as to others and still others attempted to explain.

The Commonwealth then called the police officers, who testified that she had told them that the Dr. Turner who called on the girl at her house was Augustus W. Turner and that he had offices in the Hotel Pelham and on Massachusetts Avenue beyond Symphony Hall; and that she made other statements contradictory to some to which she had testified.

The Commonwealth also introduced evidence tending to show that there was no physician registered with the board of registration in medicine in Massachusetts under the name of Theodore

W. Turner or Theodore Turner; that the defendant had an office at Hotel Pelham bearing the sign, "Chemico Electric Company. A. W. Turner, Manager," and also at 262 Massachusetts Avenue, bearing his name, Dr. A. W. Turner, on a sign, and that the latter office was five hundred and fifty feet from Symphony Hall; that both offices had telephones and that there had not been any T. W. or Theodore W. or Theodore Turner with an office at Hotel Pelham during the last five years.

A police officer of Boston testified that on Tuesday, January 5, 1915, he saw the witness Hansen and the defendant talking together at the corner of Boylston Street and Massachusetts Avenue in Boston at about twelve o'clock.

At the close of the Commonwealth's evidence, the defendant asked that all the testimony of the witness Hansen relating to conversations and transactions with the physician who attended Irene A. Richardson be stricken out, and moved that a verdict of "not guilty" be ordered. The motions were denied. Thereupon the defendant rested and asked for the following rulings:

"1. That on all the evidence a verdict of 'not guilty' should be ordered for the defendant.

"2. That on all the evidence and on the weight of the evidence a verdict of 'not guilty' should be ordered by the court.

"3. That on all the evidence the Commonwealth has failed to establish, beyond a reasonable doubt, the identity of the defendant, Augustus W. Turner, with the man alleged to have called at the home of Mrs. Hansen.

"4. That all the testimony of Mrs. Marie Hansen, with reference to the conversation, transaction and actions, which occurred between her and the man who visited her flat, and whom she says she knew as T. W. Turner, be stricken from the record and that the jury be instructed that said evidence has no bearing upon this case.

"5. That if the jury find this defendant has an office on Massachusetts avenue and another at the Hotel Pelham, they are not justified in finding on any testimony of Mrs. Hansen, that he is the man with whom she had conversation and communication at her home at Cambridge.

"6. That the so called 'dying declaration' be stricken from the records and that the jury be instructed not to consider the same

on the ground that the statement was made under the sanctity of an oath and that the statement thus loses its value under the statute.

"7. That, from the testimony of the doctors in the case called by the government, the government has failed to prove that there was any evidence of mechanical means employed to procure an abortion."

The rulings were refused. The jury returned a verdict of guilty. The defendant then moved for a new trial, as stated in the opinion. The motion was denied.

The defendant alleged exceptions, and, he then being sentenced to the State prison for a term of not more than six and not less than five years, the sentence was stayed until further order of the court.

*J. P. Walsh & C. W. Rowley*, (*G. F. Grimes* with them,) for the defendant.

*A. C. Webber*, Assistant District Attorney, for the Commonwealth.

**BRALEY, J.** The indictment charged that in violation of R. L. c. 212, § 15, the defendant with intent to procure the miscarriage of Irene A. Richardson did unlawfully use some unlawful means with said intent, and that in consequence of the use by him of said unlawful means the said Irene A. Richardson died. A verdict of guilty having been returned, the case is here on the defendant's exceptions to the admission of evidence, the form of questions, the manner of conducting the trial, the overruling of a motion to strike out a portion of the evidence, to the refusal of his requests and to the denial of a motion for a new trial.

While at common law dying declarations of a deceased person were confined to prosecutions for homicide, the St. of 1889, c. 100, now R. L. c. 175, § 65, makes such declarations admissible in the prosecution of the crime for which the defendant is indicted. *Thayer v. Lombard*, 165 Mass. 174. *Commonwealth v. Bishop*, 165 Mass. 148, 152. *Commonwealth v. Thompson*, 159 Mass. 56. *Commonwealth v. Homer*, 153 Mass. 343. It is, however, necessary before such declarations can be admitted that the presiding judge must be satisfied of the declarant's belief in the certainty of approaching death, and that the statements made are material and relevant to the issue on

trial. *Commonwealth v. Brewer*, 164 Mass. 577. *Commonwealth v. Bishop*, 165 Mass. 148, 152. The preliminary inquiry made in the absence of the jury abundantly showed and the judge by admitting the evidence found that the decedent realized that all hope of recovery was gone, and the fact that she held up her right hand and repeated to one of the attending physicians "I say this realizing I am about to die and this is true, so help me God," did not render her declaration that he performed the operation merely a statement under oath and hence, as the defendant contends, inadmissible as hearsay. *Rex v. Woodcock*, 2 Leach Crown Law, 563. It is true that she made contradictory statements as to the person responsible for her pregnancy but the change of names in the accusation went to the weight and not to the competency of the evidence when submitted to the jury. *Commonwealth v. Cooper*, 5 Allen, 495. *Commonwealth v. Roberts*, 108 Mass. 296. *Commonwealth v. Brewer*, 164 Mass. 577. And her declarations, having been properly admitted, were left for the jury's consideration under full and suitable instructions. *Commonwealth v. Bishop*, 165 Mass. 148. *Commonwealth v. Robinson*, 146 Mass. 571, 580, 581.

This evidence, when coupled with the testimony of the doctors describing her symptoms and giving their opinion as to the cause of death and the uncontradicted evidence showing the location of the defendant's office and his name as a practicing physician which corresponded with the description given by the declarant, was sufficient unless controlled to warrant the jury in finding that the decedent died as the result of an abortion unlawfully performed by the defendant, who afterwards treated her at the house of Mrs. Hansen. *Commonwealth v. Lucas*, 158 Mass. 81, 83.

The prosecuting officer having called Mrs. Hansen as a witness, exceptions to her testimony are presented and urged in various forms. The witness was the nurse to whom the decedent declared she had been sent immediately after the operation, and in whose care she remained until removed to the hospital where she died. If believed by the jury, she received and cared for the decedent in response to a call over the telephone "from Dr. Turner" who said "I am Dr. Turner that you spoke to a few months ago . . . and then he asked me if I had any rooms vacant, and I said, 'Yes.' He said, 'I am sending over a girl roomer. Would you take care

of her until I see you?'" and that while at her house he attended the decedent as a patient.

It is plain that the defendant's exceptions to the admission of this evidence from which the jury, rejecting other parts of her testimony, could say that the defendant was the guilty operator, are not well taken.

The issue of the defendant's identity was material, and when confronted with the defendant, the witness having denied that he was the doctor who telephoned or visited the house, the Commonwealth, after calling her attention thereto, was properly permitted to show previous contradictory or inconsistent statements made to police officers in which she stated that the defendant was the person with whom she dealt, and that at the first trial she testified that the doctor who called at the house "looked like the defendant." The evidence of a police officer also tending to identify her as the woman seen talking in the street with the defendant after the operation had been performed was admissible. Whatever uncertainty in identification he may have shown on cross-examination or however limited his opportunities for observation may have been, affected the weight, but not the competency of his evidence. R. L. c. 175, § 24. *Brooks v. Weeks*, 121 Mass. 433. *Commonwealth v. Richmond*, 207 Mass. 240, 245. The judge moreover told the jury when this evidence was offered, and later in full instructions, that such evidence although discrediting the witness was not to be considered as proof of the defendant's guilt. *Donaldson v. New York, New Haven, & Hartford Railroad*, 188 Mass. 484, 486.

The defendant also excepted to the form of very many of the questions, contending that they were leading, and that the witness, although called by the prosecuting officer, was being constantly cross-examined in accordance with his opening to the jury, that "we will call the nurse and put her on the stand in the course of the trial" and the "government anticipates difficulty in getting the truth from this woman." The record however fails to show that any exception was taken to the opening and, the judge having cautioned the jury that anything then said could have no effect as evidence and should be disregarded, it must be assumed that his instructions were followed. *Commonwealth v. Poisson*, 157 Mass. 510, 512, 513. It is settled that the extent to



which a party should be permitted to cross-examine or lead his own witness must be left very largely to the sound discretion of the presiding judge. *Jennings v. Rooney*, 183 Mass. 577, 579, and cases cited. *Commonwealth v. Johnson*, 188 Mass. 382, 385, 386, and cases cited. And we cannot say that the judge's discretion appears to have been so exercised as manifestly to have prejudiced the defendant, although if he had been more stringent no ground for criticism could have been justly suggested.

The jury furthermore were instructed to disregard Mrs. Hansen's entire evidence unless they were satisfied of the defendant's identity beyond reasonable doubt, and for reasons previously stated the defendant's motion to have all her evidence stricken out and withdrawn from the jury could not have been granted.

The motion that a verdict be ordered for the defendant the judge also rightly denied. If the jury, who alone were to pass upon the question, accepted the dying statements of the declarant, whose evidence, she not being an accomplice, needed no corroboration, there was evidence as we have said for their consideration that the defendant performed the operation. *Commonwealth v. Follansbee*, 155 Mass. 274, 277. *Commonwealth v. Hollis*, 170 Mass. 433, 436.

The requests for rulings were refused properly. The first, second, third, fourth, sixth and seventh rulings requested require no comment as they are covered by the discussion of the admissibility of the evidence. The fifth called for instructions on a portion only of the evidence which the judge was not required to give. *Towne v. Fiske*, 127 Mass. 125.

A new trial having been moved for, it was for the judge to determine whether it should be granted on the alleged ground that the testimony of Mrs. Hansen, the Commonwealth's witness, after the prosecuting officer with knowledge of her testimony at the former trial had stated to the jury in his opening "that the government anticipates difficulty in getting the truth from this woman," was improperly admitted, and because after calling her he had argued to the jury in closing, "that she was an abortionist nurse." *Cunningham v. Magoun*, 18 Pick. 13, 15. Nor can the decision denying the motion be reviewed on exceptions. *Lopes v. Connolly*, 210 Mass. 487, 495, 496.

We have considered all of the voluminous exceptions and, not being able to discover any material error of law, the order must be

*Exceptions overruled.*

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CHARLES E. ALLEN, administrator *de bonis non*, vs. FOURTH NATIONAL BANK.

Suffolk. March 21, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Bank. Trust, Constructive. Executor and Administrator. Fraud. Equity Jurisdiction, For an accounting. Equity Pleading and Practice, Appeal, Master's report.*

In a suit in equity, by the administrator *de bonis non* of an estate against a bank in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, it appeared that the bank had notice of the fact that the money in the account belonged to the estate, that the administrator also had a personal account in the same bank, that the personal account was overdrawn on certain occasions and that in each instance on the bank day next succeeding that of the overdraft the administrator deposited with the defendant a check on the account of the estate and also checks drawn upon other sources more than sufficient in amount to take up the overdraft. A master to whom the suit was referred found that the defendant had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate and that, by reason of the fact that the deposits of checks drawn on sources other than the funds of the estate were more than sufficient in amount to take up the overdrafts, the plaintiff had not shown that the administrator had used funds of the estate to pay his debts to the bank created by the overdrafts. The evidence was not reported. *Held*, that the findings of the master could not be reversed, and that the defendant therefore was not bound to account for the amount of the checks, on the account of the estate deposited to the administrator's personal account on the days following the overdrafts.

In the same suit it appeared that on five occasions checks of the administrator on his personal account were certified by the defendant when such certification would not have been possible if the administrator had not made a deposit on the same day in his personal account of a check improperly drawn by him on the account of the estate. The master found that on and after a date about a month previous to the last but one of the certifications, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such

facts as reasonably would lead it to suspect the misappropriation by the administrator of the funds of the estate, but that at no time did it have actual knowledge or suspicion as to such misappropriations. *Held*, that the defendant was not bound to account to the plaintiff for the amount of the checks on the account of the estate which made possible certification of the checks on the administrator's personal account.

The defendant also was held not to be bound to account for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 8, 1908, by the administrator *de bonis non* of the estate of Albert H. Bird, to recover the amount of certain checks drawn on the defendant and on the Eliot National Bank, the American National Bank, the Commercial National Bank and the City Trust Company, by one William L. Baker, as administrator of the estate of the plaintiff's intestate, to the personal order of Baker, indorsed by him and deposited in his personal account with the defendant. The prayers of the bill were that the defendant might be adjudged a trustee of the proceeds of such checks, and might be compelled to account for such proceeds.

The case was referred to a master, who found the following facts among others:

Between January 8, 1904, and March 17, 1906, Baker deposited with the defendant in an account in his name as administrator of the estate of Albert H. Bird by eleven deposits \$24,792.96. All of these deposits were of money belonging to that estate for which he was accountable as administrator. The defendant had notice of this by the opening and carrying of the account as "Wm. L. Baker Adm. Est. of Albert H. Bird."

On April 18 and December 29, 1905, Baker's personal account with the defendant was overdrawn. On the next succeeding bank day after each overdraft occurred, he made deposits to that account consisting of checks drawn on his administrator's account and checks drawn on other sources. In each instance the checks drawn on other sources were more than sufficient to take up the overdraft. The master found that, by reason of the fact that the deposits of checks drawn on sources other than the funds of the administrator's account were sufficient in amount to repay the overdraft, the plaintiff had not shown that such overdrafts

were repaid by deposits of checks drawn on the administrator's account.

At times Baker had checks upon his personal account certified. Sometimes on the same day as and sometimes on the day before the certification, he deposited with the defendant checks, drawn by him upon his administrator's account with the defendant or checks drawn by him upon his account as administrator for the same estate in other banks, sufficient in amount at least to make certification possible.

When a customer of the defendant wished a check of his certified he presented his check to the discount clerk for certification. That clerk inquired of the bookkeeper in charge of the ledger on which that customer's account was carried as to whether he had a sufficient balance to his credit to warrant the bank in certifying the check. If there was such a balance, the discount clerk made out a charge memorandum against the customer, stamped a certificate on the check, had the certificate signed by an officer of the bank and then delivered the check to the customer. The charge memorandum was handed to the paying teller, who made a note of it and passed it to the bookkeeper who kept the customer's account. That bookkeeper charged the customer with the amount of the memorandum and noted on the ledger that the charge was on account of a certified check. When the customer's account was so charged the amount of the charge was credited to an account called the certified check account, and when the check certified was paid the last named account was charged therewith. It would happen frequently that when a depositor presented a check for certification the balance to warrant the certification was made up of a deposit, made on the same day, without which the certification requested would have been refused.

The defendant is a national bank, and the federal laws with regard to certification forbid the certification of checks for a depositor unless there are actual funds in the account where the check is certified. For this reason, and for the protection of the bank against loss, care was exercised by the defendant to ascertain the true state of an account, and in some cases extraordinary care was used, the extent of the investigation depending upon who the depositor was.

The dates of the certifications of Baker's checks upon his personal

account made possible by the deposit in the personal account of checks on the Bird estate account were February 16, April 17, April 20, 1905, and March 19 and 23, 1906.

The master found, as to the examination of the condition of Baker's personal account which was made before the certification of his personal checks, that "there was no evidence whatever, except upon one occasion hereinafter referred to, that the defendant ever examined into the nature of the deposits so made by Baker to ascertain whether or not they were the equivalent of cash."

The "one occasion" referred to above is described by the master as follows: "At some time while Baker had these deposits with the defendant, the bookkeeper who had charge of the ledger in which Baker's individual account was kept became aware that Baker was transferring funds from the Bird estate account to his own. He spoke to some one in the bank about this; but to whom he spoke, or what he said, I cannot determine. This evidence did not satisfy me that this bookkeeper suspected, much less knew, that Baker was misappropriating funds of the Bird estate. On February 21, 1906, this bookkeeper had occasion to examine the deposit made by Baker to his own account that day, consisting of a \$4,000 check on the Bird estate account, and put the letters 'O.K.' after the entry crediting Baker for its amount. There was no evidence to show why he examined this deposit. I infer that he must have satisfied himself as to the source of the deposit, and in the course of so doing seen the check deposited. Baker was charged on that day with a check for \$1,800 on his individual account."

A draft for \$3,000 dated Uniontown, Kentucky, March 20, 1906, drawn by one George M. Gilbert upon Baker, payable to the order of the Uniontown Savings Bank at the defendant bank, was presented to the defendant on March 23, 1906, for payment. On that day Baker drew a check for \$3,000 upon his individual account with the defendant, payable to the order of the defendant, and passed it to the defendant's note teller. On the same day he drew a check upon his administrator's account with the defendant for \$4,000 and deposited it in his individual account. Without this deposit his check for \$3,000 upon his individual account would not have been good. The defendant received the check for \$3,000, charged it to Baker's personal account and credited the

amount of it to the National Bank of Commerce of New York, which had forwarded the draft to it.

The master further found that, "on and after February 21, 1906, when Baker deposited to his individual account a check for \$4,000 drawn on the Bird estate account, the defendant, judged from the standpoint of a reasonably prudent banker, had knowledge of such facts as would reasonably lead it to suspect that Baker, in drawing, and depositing or cashing, checks to his own order on the Bird estate account, was using without authority funds of the Bird estate for his own private purposes;" but that "at no time did the defendant have any actual knowledge or suspicion whatever that Baker was using without authority the funds of the Bird estate for his own private purposes, and the defendant was not privy to his so using those funds for such purposes." He also stated that it seemed to him that the case was governed by the decision in *Allen v. Puritan Trust Co.* 211 Mass. 409, and that the defendant was under no liability to account to the plaintiff.

The evidence was not reported. The plaintiff, by objections and exceptions to the master's report, contended that the defendant should be required to account to him for the amount of the checks on Baker's administrator's account deposited to his individual account on the days following the overdrafts, for the amount of the checks on the administrator's account deposited to the personal account for the purpose of making it possible to certify checks drawn on the personal account, and for the amount of the check on the administrator's account deposited to the personal account for the purpose of enabling Baker to give a check to the defendant on the personal account for the amount of the Kentucky draft paid for him by the defendant.

The case was reserved by *Pierce, J.*, for determination by the full court.

*E. K. Arnold*, for the plaintiff.

*N. B. Vanderhoof*, for the defendant.

**BRALEY, J.** The defaulting administrator opened two accounts with the defendant bank, one in his own name and one in his name as administrator of the estate of Albert H. Bird. It is found by the master that his individual account at various times was overdrawn for varying amounts, and that the overdrafts may have been respectively repaid the next succeeding bank days by

checks drawn on the administrator's account. But as another deposit to the credit of his individual account also had been made on those days sufficient to pay the overdrafts, the master decided that the plaintiff failed to show that the overdrafts were repaid by funds of the estate. The burden of proof rested on the plaintiff to establish the fact that the administrator had appropriated trust funds in payment of his own personal debts, and the evidence not having been reported, the master's conclusion on the facts found by him that no misappropriation had been proved cannot be revised. *Ginn v. Almy*, 212 Mass. 486.

If these transactions are thus disposed of, there remains the check for \$4,000 drawn on the administrator's account, but deposited by the administrator to his own individual credit. By the form of the accounts appearing on its books the defendant was properly held to be chargeable with notice that all moneys deposited in the name of the administrator belonged to the estate. *Allen v. Puritan Trust Co.* 211 Mass. 409. But under the finding that the defendant had no actual knowledge that the administrator was wrongfully appropriating the funds of the estate for his own benefit the suit cannot be maintained. *Allen v. Puritan Trust Co.* 211 Mass. 409.

The result is, that the plaintiff's exceptions to the report must be overruled and the bill dismissed with costs.

*Decree accordingly.*

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COASTWISE TRANSPORTATION COMPANY *vs.* NEW ENGLAND COAL  
AND COKE COMPANY.

Suffolk. March 21, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Charter Party. Contract, Construction, Performance and breach.*

A charter party chartered a certain vessel for "as many successive voyages" as could be made between certain ports, "to run to" a certain date "or until steamer now in process of construction shall be substituted in place of" the vessel chartered. A certain number of days average were to be allowed for loading and discharging, and the charterer was to pay a specified demurrage "for each and every day's detention beyond said time by default of" the charterer.

There also was a provision, "The dangers of the seas and navigation of every kind mutually excepted." The vessel was lost on her seventh voyage thirty-eight days before the "steamer . . . in process of construction" had been substituted. The owner brought an action for demurrage because of detention of the vessel in ports by default of the charterer on the six completed voyages beyond the number of days specified as average. The defendant contended that there could be no recovery because the vessel had not been kept in service continuously between the time when she was reported as ready and the time when the steamer under construction was substituted. *Held*, that the contract was entire and unambiguous and, "dangers of the seas and navigation" being excepted, the plaintiff was excused from performance after the sinking of the vessel and therefore could recover demurrage for the detention of the vessel on the six completed voyages beyond the time allowed by the charter party.

CONTRACT for demurrage alleged to be due under the provisions of a charter party described in the opinion. Writ dated January 23, 1911.

In the Superior Court the case was heard by *Hardy, J.*, without a jury. The material facts are stated in the opinion. The judge found for the plaintiff in the sum of \$4,819.21; and the defendant alleged exceptions.

*F. D. Putnam*, (*J. A. Locke* with him,) for the defendant.

*A. C. Burnham*, for the plaintiff.

**BRALEY, J.** The plaintiff's claim for demurrage depends upon the provisions of the charter party, the material provisions of which are as follows: ". . . the said party of the first part [Coastwise Transportation Company] agrees on the freighting and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and the storage of provisions, sails and cables) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, [New England Coal & Coke Company] For as many successive voyages from Newport News, and Norfolk, Va. and Baltimore, Md. to Boston or Portland, beginning at the expiration of their present charters to run to Dec. 30th, 1909, or until steamer now in process of construction shall be substituted in place of said schooners, on the terms following: The said vessel shall be tight, staunch, strong and every way fitted for such a voyage, and receive on board during the aforesaid voyage the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel, a full cargo of coal, and to pay said party of the first part, or agent, for the use of said vessel



during the voyage aforesaid Sixty five cents (65c) from Baltimore, Md. and Fifty five cents (55c) from Newport News and Norfolk, Va. to Boston. If ordered to Portland rate of freight on same terms except that vessel shall receive bridge money 3c per ton for each bridge used. If vessel is ordered to Mystic Wharf Boston, the party of the second part is to pay bridge money at the rate of 1c per ton for each bridge used. If vessel is sent to N. E. Coal & Coke Co.'s wharf, Everett, no bridge money is to be paid to vessel per ton of 2240 lbs. Coal to be loaded and discharged free of expense to vessel, but vessel to trim as customary.

"It is agreed that 8 days average (Sundays and Holidays excepted) are to be allowed for loading and discharging, both inclusive, commencing from the time the Captain reports vessel ready to receive or discharge cargo.

"For each and every day's detention beyond said time by default of said party of the second part, or agent, five cents per ton on Bill of Lading weight per day and pro rata for portion of a day shall be paid by said party of second part, or agent, to said party of the first part, or agent. . . .

"The dangers of the seas and navigation of every kind mutually excepted. . . .

"To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel's freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated amount of this charter; and the vessel holding a lien upon the cargo for freight and demurrage."

*Randall v. Sprague*, 21 C. C. A. 334, and cases cited in note 337, 338. *Hagerman v. Norton*, 46 C. C. A. 1. See *Hall v. Barker*, 64 Maine, 339, 343.

While two of the plaintiff's schooners were chartered, it was agreed "that by the contemporaneous construction of the charter party by the parties, the two schooners were to be treated separately, and there was to be no averaging of time between the two vessels, and the time consumed by the 'William L. Douglas' in no wise affects the rights of the parties in this suit," and that the words "as many successive voyages," meant "as many successive voyages as can be made."

The plaintiff's other vessel, the "Mertie B. Crowley," having completed six round voyages, was lost on her seventh voyage by a peril of the sea, thirty-eight days before the steamer in process of construction had been commissioned or substituted as provided in the charter party. It is the defendant's contention that, the vessel not having kept on sailing continuously between the time when she reported as ready for loading and when the steamer was substituted, no demurrage ever accrued or was due.

But the contract is entire and unambiguous. It is to be construed accordingly, and "the dangers of the seas and navigation" are expressly excepted. The plaintiff did not contract that the vessel should make as many trips as actually could be made within the period if all dangers of the seas or of navigation were excluded, but only promised performance subject to those dangers and exceptions. The judge, before whom the case was tried without a jury, having been warranted in finding on the evidence that neither party had terminated the contract, and there having been no contention that the vessel had not made as many trips as were possible at the time she was wrecked, the vessel had fulfilled all the obligations imposed by the charter party. The plaintiff therefore was entitled to recover demurrage for the voyages which had been completed. *Brown v. Hunt*, 11 Mass. 45. *Morgan v. Garfield & Proctor Coal Co.* 113 Fed. Rep. 520, 522.

The next question is upon what basis should the amount of demurrage be computed. In compliance with the defendant's sixth request, the judge ruled that under the language of the charter party, "eight days average for loading and unloading, both inclusive," the charterer was entitled to average together the days taken for loading with the days taken for unloading on all trips as a basis for the "determination of whether or not any demurrage was due," and awarded damages for overtime beyond the lay days allowed during each voyage for loading and discharging the cargo. See *Elswick Steamship Co. Ltd. v. Montaldi*, [1907] 1 K. B. 626. By this construction it is apparent that the provision giving the vessel "a lien upon the cargo for freight and demurrage" is disregarded. But, the plaintiff not having excepted to the ruling and being satisfied with the finding, it is unnecessary to determine whether the average overtime to secure which the vessel was given a possessory lien should not have

been ascertained for each voyage and the plaintiff's damages correspondingly increased.

The defendant's other requests for rulings in so far as not given or waived at the argument, having rested on its contentions that the demurrage must be so computed as to average the time for discharging and loading on all the voyages the vessel could have made if she had continued in the service until the substitution of the steamer, and that, the vessel having been lost before that time, even if by perils of the sea, the action could not be maintained, were denied rightly. The exception to the exclusion of evidence has been waived and, the defendant having failed to show that it has been prejudiced, the exceptions must be overruled.

*So ordered.*

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JOHN W. MATTHYS vs. HENRY HORNBLOWER & another.

Suffolk. March 21, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Wagering Contracts. Stockbroker. Pleading, Civil, Declaration. Practice, Civil, Auditor's report, Exceptions. Conflict of Laws.*

Allegations in the declaration in an action of contract against a stockbroker in which the plaintiff seeks to recover sums paid to the defendant for transactions upon margins, that the plaintiff "had no intention to perform said contract" to purchase certain stocks upon margin, and that the defendant "had reasonable cause and well knew that the plaintiff had no intention to actually perform said contract," are not the equivalent of, nor can they be construed into, an affirmative allegation of the fact, which is a prerequisite to the maintenance of an action under R. L. c. 99, § 4, that at the time of making the contract the plaintiff intended that there should be no actual purchase or sale.

If, at the trial of such an action, the plaintiff testifies that he told the defendant that he wished to trade on margin, buying when he desired and selling when he desired, taking the market quotation, and, if there was a rise, to sell and to settle his account on the rise and fall of the market, and that he did not want the stock certificates, a finding is warranted that the plaintiff intended at the time of the contract that there should be no actual purchase or sale.

Findings of an auditor to whom was referred an action of contract against a stockbroker for the recovery of money paid to the defendant for transactions alleged to have been upon margins, that all the purchases and sales ordered by the plaintiff "were actual transactions," and that in "every case, whether of purchase or sale, a check for the full amount duly passed from or to the defendant as the case might be," where the auditor also finds that, at all times between

the purchase and sale of each kind of stock, the defendant had on hand or within his immediate control enough of the stock to meet the demands of all his customers including the plaintiff, are not inconsistent with other findings of the auditor in substance that, in the case of certain purchases there was no actual delivery of certificates to the defendant because, on the same date as the purchase by the defendant from the plaintiff, the defendant sold for another customer the same number of shares that he purchased from the plaintiff, and, according to the custom of brokers under such circumstances, the broker from whom the defendant purchased delivered the stock directly to the broker to whom he sold, "rather than through the defendant, thereby saving unnecessary steps, and accomplishing the same result;" and that there was for the same reason no delivery to the defendant in the case of certain sales for the plaintiff on the same days when the defendant purchased the same number of shares of the same stock for other customers.

The findings of the auditor in the above described case being the only evidence upon the issue to which they related, a verdict was held properly to have been ordered for the defendant because as a matter of law he had sustained the burden of proving under R. L. c. 99, § 4, that all the purchases and sales upon orders placed with him by the plaintiff were "actual."

In such an action the plaintiff's knowledge or ignorance of how much of the money deposited by him "was put on each security" was held not to be material to the determination of the issue of his intention at the time of the making of the contract or of the issue of the defendant's reasonable cause to believe that the plaintiff had an intention that there should be no actual sale or purchase.

An exception to the exclusion of a question at a trial will not be sustained where there is no offer of proof to show what answer to the question was expected.

In this action against a stockbroker with offices in Boston, New York and Chicago, to recover under the laws of Massachusetts certain amounts of money paid to the defendant as margins upon wagering contracts, where it appeared that the money was paid and the orders were given in Chicago, where the plaintiff lived, it was not determined but it was assumed that R. L. c. 99, § 4, applied, it being held that under the circumstances the defendant had done nothing to render him liable under the statute.

PIERCE, J. This is an action of contract, brought by the plaintiff to recover from the defendants certain moneys paid to them in the course of certain purchases and sales of stock upon margin.

At the trial before the jury, the only evidence introduced was the testimony of the plaintiff and the auditor's report. At the conclusion of the evidence the presiding judge,\* at the request of the defendants' counsel, directed the jury to return a verdict for the defendants, which was done, and the plaintiff duly excepted to the order.

The plaintiff testified that in December, 1908, and during all of the time of the transactions complained of, he lived in Chicago,

\* Fox, J.

Illinois; that on or about December 1, 1908, he told the defendants in Chicago "that he wished to trade on margin, buying when he desired and selling when he desired, taking the market quotations, and if there was a rise to sell and settle his account on the rise and fall of the market; that he told the defendants' agents that he did not want the stock certificates; and that the defendants never at any time offered any stock to him, either directly or indirectly; and that the defendants' agents told him that he could do business with the defendants that way." Thereupon, he deposited with the defendants' Chicago office \$2,698.64 in money, which sum was paid to and received by the defendants on margin, to secure them on such stock purchases as they might make and carry on the plaintiff's orders. Thereafter, he deposited with the Chicago office \$1,000 in money and twenty-five shares of the Cumberland-Ely stock of the value of \$300, as collateral for the same purpose as the original deposit.

All moneys paid and all orders given to the defendants were paid and given to them at the Chicago office. And all orders were given with the written direction that they "be executed according to the rules and customs of the Boston, New York and Chicago stock exchanges and may be through a buyer or seller contract at your discretion." The defendants had their principal office and place of business in Boston, with branches in New York, Chicago and elsewhere, and were members of the stock exchanges in those places.

The declaration is in three counts: the first count alleges that in December, 1908, the plaintiff "contracted with the defendants as stockbrokers to buy for him certain copper mining stocks upon margin, at different times thereafter, and for that purpose then and there he paid into the hands of said brokers the sum of" \$2,698.64; "and that at the time of making said contract he had no intention to perform said contract by the actual receipt of said copper mining stocks and the payment of the price therefor; and that said defendants had reasonable cause and well knew that the plaintiff had no intention to actually perform said contract by the receipt of said copper mining stocks and the payment of the price therefor, wherefore . . ."

The second count is identical in its allegations except that the sum of \$1,000 is stated to have been paid January 8, 1910.

The third count is like the first and second, except that in place of a payment of money it is alleged that the plaintiff assigned and transferred twenty-five shares of the Cumberland-Ely mining stock.

The answer set up a general denial, payment, account stated, accord and satisfaction, "an actual purchase of each of the securities which the plaintiff directed them to purchase, and an actual sale of each of the securities which the plaintiff directed them to sell," and also that the defendants made "a valid contract for the purchase of each of the securities which the plaintiff directed them to purchase, and a valid contract for the sale of each of the securities which the plaintiff directed them to sell."

The defendants contend that the plaintiff's declaration states no ground of action. The statement in the several counts of the declaration that the plaintiff "had no intention to perform said contract" and that the "defendants had reasonable cause and well knew that the plaintiff had no intention to actually perform said contract," was not the equivalent of nor can it be construed into an affirmative statement that the plaintiff at the time of making the contract intended "that there shall be no actual purchase or sale . . ."

The plaintiff's testimony, above quoted, warranted the submission to the jury, as an issue of fact, of the question of the plaintiff's affirmative intent "that there shall be no actual purchase or sale . . ." and the question of the defendants' "reasonable cause to believe that said intention existed."

The auditor found, apparently upon undisputed evidence, that orders for purchase and sale given to the Chicago house by the plaintiff were largely executed in Boston, although purchases in some instances were executed in New York and in Chicago. The auditor finds "all of the above purchases and sales were actual transactions. In every case, whether of purchase or sale, a check for the full amount duly passed from or to the defendants, as the case might be."

The plaintiff contends that upon the auditor's finding of fact the jury could reasonably draw a different inference of fact, and therefore, that the evidence upon the issue of actual purchases and sales should have been submitted to the jury. The facts which the plaintiff argues are inconsistent with the auditor's

conclusion of fact as stated by the auditor are as follows: "In the case of the following purchases: 100 Miami December 30th, 1908, 50 Superior & Boston November 8th, 1909, and 100 Keewenaw, January 24th, 1910, there was no actual delivery of certificates to the defendants. In each of these three instances the defendants, on each of the above dates, sold the same number of shares of these stocks as they then bought. In this way the sale offset the purchase in each case, and, according to the custom of brokers under such circumstances, the broker from whom the defendants bought delivered the stock directly to the broker to whom they sold, rather than through the defendants, thereby saving unnecessary steps, and accomplishing the same result. . . . In the case of the sales of the 100 Boston Consolidated on August 12th, 1909, and that of the 50 Keewenaw on December 8th, 1910, there was no actual delivery of certificates by the defendants. In each of these instances there was a corresponding purchase by the defendants that day of the same number of shares of these stocks, resulting in an offset, and a direct delivery by the broker from whom they bought to the broker to whom they sold, without the intervention of the defendants." These facts are not necessarily inconsistent with actual transactions of purchase and sale.

The auditor finds "that at all times between the purchase and sale of each of the above stocks the defendants had on hand, or within their immediate control, enough of said stocks to meet the demands of all their customers, including the plaintiff." That the defendants had such stock in hand or within their immediate control is not disputed. This fact being so, the result that followed the offset in the instances of purchase was that the defendants applied their own stock to the plaintiff's order, and in the case of sale were left by reason of the offset with a like number of shares to apply to the orders of other customers. The transactions are found by the auditor to have been actual and not fictitious and there is nothing in the record to show that the conclusion of fact was not warranted. *Fiske v. Doucette*, 206 Mass. 275. *Greene v. Corey*, 210 Mass. 536.

The plaintiff's knowledge or ignorance of how much of his deposit "was put on each security" does not appear to have been material to the determination of the issue of his intention at the time

of making the contract, or of the defendants' reasonable cause to believe the plaintiff had an intention that there should be neither actual sale nor purchase. There was no offer of proof of the expected answer to the question "Now, Mr. Matthys, did you ever know how much of the amounts of money that you deposited with the defendants was put in on each security or each stock alleged to be purchased?" And the exception to the refusal to permit it to be answered must be overruled.

We have considered the case at bar without regard to the form of the declaration, and on the assumption most favorable to the plaintiff, without deciding that the validity and construction of the contract as well as the rights and obligations of the parties thereto are to be determined by the laws of this Commonwealth. So considered, it follows that there was no error in the order directing the jury to find a verdict for the defendants.

*Exceptions overruled.*

*J. M. Browne*, for the plaintiff.

*H. W. Ogden*, for the defendants.

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THOMAS M. REYNOLDS vs. MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY & others.

Suffolk. March 22, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Trustee Process. Practice, Civil, Appeal, Costs.*

It here was not disputed that an attempted service by trustee process upon an alleged trustee merely by serving the writ upon another as his agent is insufficient.

One who is summoned as trustee by trustee process is a party to the action, and an order discharging him is a final judgment so far as he is concerned, he having no interest in the principal controversy. Therefore an appeal from such an order may be entered in this court without waiting until the action is disposed of on its merits and is ready for judgment.

In deciding the point stated above it was said that the decision was confined strictly to the facts of the case and does not narrow the general rule as to appeals from interlocutory orders illustrated in *Weil v. Boston Elevated Railway*, 216 Mass. 545.



Under R. L. c. 189, § 69, if a person attempted to be summoned by trustee process as trustee is discharged by an order of the court because the service upon him was insufficient, he may be awarded costs and counsel fees by the order of discharge.

RUGG, C. J. This case has been reported by a judge of the Superior Court \* for determination as to the correctness of his rulings made subsequent to discharging ten corporations named in the writ as trustees of the principal debtor.

1. No contention is made that the trustees were not discharged rightly. Return of service upon a person simply "as agent" of a party is insufficient. *Kimball v. Sweet*, 168 Mass. 105. *Lowrie v. Castle*, 198 Mass. 82, 87.

2. The plaintiff appealed from the decree discharging the trustees and awarding costs and attorneys' fees in their favor against the plaintiff. One question is, whether these appeals may be entered in this court forthwith, *Griffin v. Griffin*, 222 Mass. 218, or whether they should wait until the main case is disposed of on its merits. It is settled that ordinarily no case can be entered in this court until it is ready for final disposition, and that interlocutory matters will not be heard until the case is ready for judgment, *Weil v. Boston Elevated Railway*, 216 Mass. 545, where the reasons are stated and the authorities reviewed. In a certain sense orders in reference to a person summoned as trustee may be termed interlocutory. They are so when he is charged, for then they depend on the final judgment which may be entered. But a trustee is a party. When he is discharged, that is a final judgment so far as he is concerned. His relations to the main matter are such that, if he is entitled to a discharge, he cannot be affected by any decision as to the merits between the plaintiff and the defendant. Having no interest in the principal controversy, he stands in a peculiar relation to the cause and is entitled to the protection of the court so far as is reasonably practicable. The order for the discharge of a trustee being final in its nature and not susceptible of modification by other proceedings in the case, that order is ripe for consideration in the ordinary case even though the chief controversy has not terminated. *Sprague v. Auffmordt*, 183 Mass. 7. *Hutchins v. Nickerson*, 212 Mass.

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\* *Wait, J.*

118. The case of *Brennan v. McInnis*, 172 Mass. 247, plainly is distinguishable. But the present decision is confined strictly to these facts and does not narrow the general rule illustrated in *Weil v. Boston Elevated Railway*, *ubi supra*.

3. The plaintiff has presented an elaborate argument based upon the history of R. L. c. 189, §§ 67, 68, 69, to the effect that a trustee should not be awarded costs unless he appears and answers and even though his preliminary plea to the jurisdiction is sustained. It is not necessary to review the statutes or to enter into a full discussion of the subject.

The plain words of § 69 are that any one summoned as trustee, who is discharged, shall have judgment for costs and charges. This seems to be the import of earlier statutes, at least as far back as Rev. Sts. c. 109, §§ 49, 50, 51. The practice has been established contrary to the plaintiff's contention. It was stated by Chief Justice Parsons in *Wilcox v. Mills*, 4 Mass. 218, at page 220, by way of illustration, that one summoned as trustee to a court without jurisdiction over him and therefore discharged would be "entitled to his legal costs, and perhaps to such further costs as would compensate him for his time and expenses." These words hardly could have been used unless the practice were then perfectly well recognized. Whatever doubt may have existed under earlier statutes or decisions, *Osgood v. Thurston*, 23 Pick. 110, 111, *Williams v. Blunt*, 2 Mass. 207, 217, *Clark v. Rockwell*, 15 Mass. 221, it has been settled in this Commonwealth now for a long time that a court without jurisdiction over a party defendant still may award costs in his favor even though the defect may appear on the face of the papers. *Hunt v. Hanover*, 8 Met. 343. *Elder v. Dwight Manuf. Co.* 4 Gray, 201. *Smith v. Pike*, 160 Mass. 24. In the light of these decisions, it is not necessary to consider the differences between them and *M'Iver v. Wattles*, 9 Wheat. 650, and *Bradstreet Co. v. Higgins*, 114 U. S. 262, and the reasons therefor. This rule should apply to trustees as well as to ordinary defendants. The general principle is that one summoned as trustee should be in no worse posture than if left to settle his indebtedness with his principal creditor. *Cavanaugh v. Merrimac Hat Co.* 213 Mass. 384.

The entry may be, that the decree in favor of the several trus-

tees, for costs and counsel fees, is affirmed, together with costs and a counsel fee to each trustee in this court.

*So ordered.*

*J. L. Thorndike, (F. V. Barstow with him,) for the defendants.*

*B. Corneau, (W. C. Rice with him,) for the plaintiff.*

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JENNIE M. DORNTREE & another vs. JOHN LYONS & another.

Middlesex. March 23, 1916. — May 19, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Way, Private: by prescription. Easement, By prescription.*

The acquisition of a right of way over a passageway by its continuous use during a period of more than twenty years is not impaired by a temporary obstruction of the way in the course of that period by means of barrels and planks placed there by a stranger without authority from or ratification by the owner of the land over which the right of way is acquired.

PETITION, filed in the Land Court on August 24, 1914, for the registration of a parcel of land with the buildings thereon on Massachusetts Avenue in the town of Arlington.

In the Land Court the respondent Lyons claimed a trial by jury, and the judge of the Land Court framed the following issue to be tried before a jury in the Superior Court:

"Is there any easement over the passageway parcel of land claimed by the petitioners appurtenant to the land of the respondent, Lyons, which has been acquired by prescription, and, if so, what?"

In the Superior Court the case was tried before *Bell, J.* The evidence is described in the opinion. In submitting the issue to the jury the judge, in referring to the necessity of an interruption to prevent the acquiring of a prescriptive right, said: "It (the use) must be uninterrupted, I must tell you that means uninterrupted by the owner of the property; the owner of this property until within a very short time before this petition was brought was Mrs. Pitts. I think it was the estate of Mrs. Pitts, and Mrs. Pitts was the person against whom this right of way was being acquired, if it was being acquired by anybody, and it was for her

to either interrupt or leave it alone as she chose. The fact that some other person who has land adjacent put barrels there or any other obstruction does not avail Mrs. Pitts, unless it was done by her orders or she ratified what was done. She was the person against whom the right was being acquired and the interference of some other party, although meaning well, does not help Mrs. Pitts to prevent the right being acquired against her, unless she in some way accepts the acts of other people. Therefore, you are not to consider interruptions if there were any in that line."

Upon the issue submitted to them the jury answered "Yes;" and the petitioners alleged exceptions to the portion of the judge's charge quoted above.

A copy of the plan referred to in the opinion is printed on page 258. The title of this plan as printed upon it was as follows: "Plan of Valuable House Lots for Sale in Arlington, Mass. Belonging to Mrs. Harriet A. Pitts. Being the second parcel set off from the estate of George Peirce. April 27, 1886. W. A. Mason & Son. Surveyors, Cambridgeport."

The case was submitted on briefs.

*H. A. Wilson, F. Juggins & T. F. Murphy*, for the petitioners.

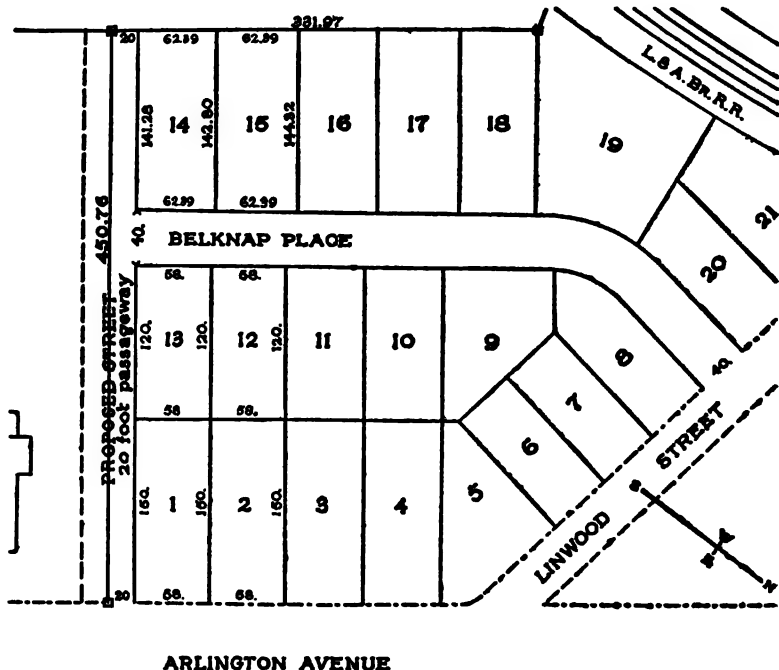
*A. F. Crowley*, for the respondent Lyons.

DE COURCY, J. A large tract of land in Arlington was partitioned in 1883 into three parcels, Louisa Cook taking one and Harriet A. Pitts the second, which was adjoining and north of the first. These two owners agreed to contribute sufficient land to provide for a forty foot street along the division line between their respective parcels; but later Louisa Cook repudiated her agreement and erected a fence on the division line. This fence was torn down in 1907 by the respondent Lyons, who at that time had purchased all the parcel originally owned by Louisa Cook.

The Harriet A. Pitts parcel was divided into lots in 1886, and a plan of the same was recorded. The proposed street appears on this plan, the centre line thereof indicating the southerly boundary of her land; and the twenty foot strip of her land adjoining this boundary is the passageway involved in this controversy.

The lot of the petitioners (being lot 1 on said plan) was conveyed by Harriet A. Pitts to a predecessor in title of the petitioners in 1886. In the deed it was described as "Beginning at a point on the southwesterly side of Massachusetts Avenue, formerly Arlington

Avenue, at the corner of a twenty-foot passageway, now called Belknap Place, and from thence running northwesterly by said line of Massachusetts Avenue fifty-eight feet to lot two (2) on said plan; thence turning and running southwesterly by said lot two (2) one hundred and fifty feet to lot thirteen (13) on said plan;



thence turning and running southeasterly by said lot thirteen (13) fifty-eight feet to said twenty-foot passageway; thence turning and running northeasterly by said twenty-foot passageway one hundred and fifty feet to said Massachusetts Avenue and point of beginning."

Lot 13 on the plan adjoins the lot of the petitioners on the west. Its southerly line is one hundred twenty feet long and abuts on said passageway. Its westerly line is fifty-eight feet in length, and abuts on a forty foot street, indicated as Belknap Street, although Belknap Street was first laid out and graded about 1896.

On May 4, 1893, Harriet A. Pitts conveyed this Lot 13 to Caroline A. Stearns, "together with the right to use said twenty-foot passageway from Arlington Avenue to the southwesterly line of said forty-foot street extended to land of Louisa Cook and said forty-foot street through its entire length for passing and repassing and all the purposes for which public streets are or hereafter may be commonly used." The forty foot street referred to doubtless is Belknap Street. The title and interest of Mrs. Pitts in so much of the passageway as lies west of the westerly line of Belknap Street extended southerly, apparently was conveyed by her to Edward L. Smith on July 1, 1893; but the record is obscure and confusing in this and some other particulars.

The petitioners applied to the Land Court for registration of their lot (No. 1) and of the said passageway from Massachusetts Avenue to Belknap Street. A jury claim having been filed by the respondent, the judge of that court framed this issue, which was submitted to a jury in the Superior Court: "Is there any easement over the passageway parcel of land claimed by the petitioners appurtenant to the land of the respondent, Lyons, which has been acquired by prescription, and if so, what?" The answer of the jury was "Yes."

At the trial of this issue in the Superior Court, there was evidence offered by the respondent that he had used the said passageway continuously for a period of at least twenty-one years as a means of travel to and from certain coal yards which were on the northerly side of the railroad track shown on the plan, and for other purposes. His route was from Linwood Street through Belknap Street to the passageway in question, then through said passageway to Massachusetts Avenue. On behalf of the petitioners there was evidence that Stearns, the owner of Lot 13, had erected obstructions, consisting of planks placed on the tops of barrels, across said passageway in two places; — one at its easterly end, parallel with the line of Massachusetts Avenue, the other along the easterly line of Belknap Street, extended. The petitioners excepted to that portion of the judge's charge to the effect that the obstruction of the passageway would be ineffective to prevent the acquiring of a prescriptive right unless such interruption was authorized or ratified by the owner of the passageway. This is the only exception before us for consideration.

We assume that the petitioners own the fee in the northerly half of that section of the passageway which abuts on their lot, and that Mrs. Pitts owns the fee in the southerly half. See *Gould v. Wagner*, 196 Mass. 270; *Kaatz v. Curtis*, 215 Mass. 311. But the acts of Stearns in maintaining for a few days the obstructions at the easterly end of the passageway were not authorized or ratified by either of them. We infer that "Stearns, the owner of Lot 13" is Caroline A. Stearns, to whom Mrs. Pitts conveyed that lot in 1893. Her only interest in this portion of the way, so far as shown by the record, above recited, was a right to use it for ordinary travel. Manifestly this right to use the passageway was not confined to the petitioners and to the owners of Lot 13, but was enjoyed by an indefinite number of other persons. As the plan indicates, this twenty foot passageway, originally designed as the northerly half of a forty foot street, connects Massachusetts Avenue, a public way, with Belknap Street, which in turn runs into Linwood Street. See *Downey v. H. P. Hood & Sons*, 203 Mass. 4; *Attorney General v. Onset Bay Grove Association*, 221 Mass. 342, 347.

The obstruction opposite the lot of the petitioners was placed there by Stearns "for the purpose of preventing the acquiring of any prescriptive rights by third persons." It does not appear to have been even brought to the notice of the respondent. Such temporary intrusion or occasional trespass by a stranger does not interrupt the running of the statute in behalf of an adverse occupant. R. L. c. 130, § 2. *Proprietors of Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42, 45. 2. C. J. 98.

The other obstruction, at the westerly end of Lot 13, does not seem material to the registration of the land of the petitioners. Over that portion of the passageway they have only a right of way, and that right is not disputed. The rights of Stearns in that part of the passageway are not before us for determination. No copy of the deed from Pitts to Stearns is in the record, and all the parties interested are not before the court.

We find no reversible error in the portion of the charge objected to, and the entry must be

*Exceptions overruled.*

## EDWARD J. WELCH vs. HELEN B. HALEY.

Middlesex. March 24, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; PIERCE, JJ.

*Deed*, From tax collector. *Tax*, Collector's deed. *Evidence*, Presumptions and burden of proof.

St. 1911, c. 370, providing that the deed of a collector of taxes conveying land sold for non-payment of taxes, if recorded within thirty days, "shall be *prima facie* evidence of all facts essential to its validity," establishes a rule of procedure which applies to deeds executed in pursuance of sales made before as well as of those made after its enactment.

Where a deed given by a collector of taxes in pursuance of a sale for non-payment of taxes describes well known land by the numbers of lots on a described plan filed in the registry of deeds, giving the number of the book of plans and the number of the plan, the description is sufficient for reasonable identification of the land conveyed, which is all that is required.

In a tax collector's deed, in which the essential facts in regard to the sale in pursuance of which the deed was given are recited, a mistake of twenty-five cents in favor of the delinquent taxpayer in the computation of interest at the sale for non-payment of taxes and a mistake of five cents against such delinquent in the determination of his interest in the surplus following a later sale of the unredeemed land do not make either the sale or the deed voidable.

Under the provision of R. L. c. 13, § 43, that the deed of a collector of taxes given pursuant to a sale for non-payment of taxes "shall convey . . . all the right and interest which the owner had in the land when it was taken for his taxes," the fact that the deed purports to convey the whole of the real estate described instead of all the right, title and interest which the owner had does not affect the title given by the deed and therefore does not invalidate the deed.

Where land is sold to the town in which it lies for non-payment of taxes and seven years later, the land not having been redeemed, the unredeemed land is sold by the town under St. 1909, c. 490, Part II, § 68, the later sale is not in any accurate sense a tax sale, and its validity or invalidity cannot affect the title of the town as the purchaser at the previous tax sale; and accordingly the title given by the deed of the collector of taxes of the town after the later sale is not impaired by the fact that the assessment of taxes required by R. L. c. 13, § 66, to be made after the town bought the land "as though the same were not so taken or purchased" was only in fact made in the last one of the seven intervening years.

PIERCE, J. This is a petition to register the title to a parcel of land in Lexington. The petitioner's title depends upon the validity of a sale to the town of Lexington for taxes for the year 1905, and a subsequent sale by the town under St. 1909, c. 490, Part II, § 68.



The petition was referred to one of the examiners of title as master\* on November 12, 1915. The master made a report to which thirty-one exceptions were taken by the respondent. After due hearing, the Land Court made a decision overruling the exceptions and confirmed the master's report. The respondent appealed from the decision of the Land Court made † on January 17, 1916.

The respondent in her brief has gathered and considered her exceptions in "groups" for convenience in argument and in citations of authorities, and we adopt the respondent's classification in the consideration of her exceptions.

The exceptions numbered 1, 2, 3, 4, 5, 6 and 18 relate to the master's admission of the tax deed for the tax of 1905 as *prima facie* evidence of all facts essential to its validity. It is not contended by the respondent that St. 1911, c. 370, is unconstitutional, in that its declaration of the procedural weight to be given to a deed of land sold for the non-payment of taxes, given by a collector and recorded within thirty days after the sale, has the effect to deprive her of her property without due process of law, but she maintains and asserts that the act, in its legal intention, applies only to deeds executed upon a sale for taxes levied subsequently to the passage of the statute.

The master found that the assessors of the town of Lexington were duly elected and qualified for the year 1905; that the assessment for that year was: "Name 'Broughton, Helen' General Headings 'Meagher lots' Description 'Block 17, Lots 22 and 23' Value '\$200.00' Total value '\$200.00' Tax '4.08';" that "the land in question is situated in the Town of Lexington and consists of lots twenty-two (22) and twenty-three (23) in Block 17 on Plan of Lots in Lexington Heights owned by Mark C. Meagher, Surveyed by E. A. W. Hammett, C. E., dated July, 1892 and recorded with Middlesex (So. Dist.) Deeds, Book of Plans 77, Plan 24;" that the land covered by this plan is also known in Lexington as the Meagher land; that the respondent was the owner of these two lots in 1905 when the tax for that year was assessed, and that the tax for that year (1909) was not paid by the respondent.

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\* Under R. L. c. 128, § 35, "to hear the parties and their evidence and make report thereof to the court as to any tax titles involved."

† By Corbett, J.

The deed recites that Helen Broughton (now Helen Broughton Haley) of Boston in the year 1905 was duly assessed as owner of the real estate hereinafter described in the sum of \$4.08; and that the assessment was duly committed to the collector for collection.

The deed contained a description of the land sold and a covenant "that the sale and proceedings aforesaid have in all particulars been conducted according to the provisions of law."

The recitals in the deed show a performance of every condition precedent and a statement of all substantive facts required to authorize a sale of land for the non-payment of taxes by R. L. c. 13, and by St. 1905, c. 193.

There was no evidence at the hearing before the master, outside the recitals in the deed, to establish or to contradict the facts therein stated. If *prima facie* the statements in the deed are to be taken to be true, they establish, in connection with the specific facts found by the master, his conclusion that the sale was properly conducted and that the title acquired by the sale is valid. St. 1911, c. 370, in the provision that a deed given by a tax collector, if recorded within thirty days after the sale of the land, "shall be *prima facie* evidence of all facts essential to its validity," establishes a rule of procedure which changes the order of proof but not the burden of proof. The application of the rule is necessarily restricted to the statements of essential facts required to be stated in the deed by St. 1905, c. 193, now St. 1909, c. 490, Part II, § 44; and so construed, the rule is applicable to deeds executed upon sales made before as well as after the enactment of the statute.

The exceptions numbered 9, 10, 11, 12, 13, 16, 17, 18, 20, 21, 29 and 30, each referring to the question of the payment of the 1905 tax in 1907 by the respondent to the collector of taxes of the town of Lexington, must be overruled, because the master's finding that the tax was not paid by the respondent has ample support in the reported facts, and because, were it otherwise, it could not be ruled in the absence of a report of all the material evidence that the conclusion of fact of the master was clearly wrong.

Exceptions 11, 14, 15, 17, 18, 22, 23, 24, 26 and 28 each relate to the validity of the tax deed for the non-payment of the taxes assessed upon the land for the year 1905.

The first contention is that the deed is inaccurate in its description of the premises sold and conveyed, in that it recites the record of the same to be "in the Southern District of Middlesex County Registry of Deeds Book 77 and dated 1892." There is nothing in this exception; rejecting the reference to the book of registry the land on the undisputed finding of the master was a well known tract in the town of Lexington and was sufficiently described to permit of reasonable identification. This was sufficient. *Welsh v. Briggs*, 204 Mass. 540, 552. *Connors v. Lowell*, 209 Mass. 111, 120. Moreover, it is entirely plain that "Book 77 and dated 1892" are referable to the record and date of the plan of lots and not to the deed of the premises.

The error of twenty-five cents in favor of the respondent, in the computation of interest at the sale in 1907, and of five cents against the right of the respondent in the determination of her interest in the surplus following the sale of the unredeemed land in 1914, did not operate to make either sale or deed void or voidable.

The conveyance of the whole of the real estate to the town of Lexington did not affect its title. The words of R. L. c. 13, § 43, "shall convey . . . all the right and interest which the owner had in the land when it was taken for his taxes" were not intended to cut down the effect of a sale, but simply to declare that the effect was not diminished by an intervening alienation." *Langley v. Chapin*, 134 Mass. 82, 88.

The remaining exceptions relate to the assessment of the land between the sale in 1907 and the sale of the unredeemed land in 1914. R. L. c. 13, § 66, provides "If the land is taken or purchased by a city or town, taxes shall be assessed thereon as though the same were not so taken or purchased; and shall be deducted from the proceeds of the final sale." As a matter of fact, there was no assessment until the year 1913. The sale in 1914 was in pursuance of St. 1909, c. 490, Part II, § 68; it was not in any accurate sense a tax sale. The former owner's only interest was in the surplus remaining after proper deductions for unpaid tax assessments, interest and charges. The validity or invalidity of the sale could not affect the title of the purchaser at the 1907 sale.

*Decision affirmed.*

*C. G. Morgan*, for the respondent.

*C. H. McSweeney*, for the petitioner, submitted a brief.

MARIA C. STAGNARO vs. JAMES FITZGERALD.

JOHN STAGNARO vs. SAME.

Suffolk. March 24, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Landlord and Tenant. Negligence, Of one controlling real estate.*

In an action against one owning and controlling an apartment house by a tenant of one of the apartments for personal injuries sustained by reason of a defect in a common stairway, where there is evidence that the stairway at the time of the injury was not in as good condition as it was when the plaintiff moved in, that the defendant's attention had been called to the alleged "unsafe and dangerous condition" of the stairway two weeks before the accident, that the plaintiff was going down the stairs slowly with her hands on the rail, that when she was about half way down her left foot got caught on a broken step and that she tried to hold herself by her hands but fell to the bottom of the stairs, the questions of the plaintiff's due care and of the defendant's negligence are for the jury.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained by her on January 22, 1912, by reason of a defective stairway in a house alleged to be owned and controlled by the defendant, in which the plaintiffs occupied a tenement and used the stairway in common with other tenants, and the second action by the husband of the plaintiff in the first action for expenses incurred by reason of her injuries. Writs dated April 13, 1912.

In the Superior Court the cases were tried together before *Lawton, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiffs were not entitled to recover. The judge refused to make this ruling and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of \$1,800 and a verdict for the plaintiff in the second case in the sum of \$200. The defendant alleged exceptions.

*C. S. Knowles*, for the defendant.

*F. W. Fosdick*, for the plaintiffs.

PIERCE, J. There was evidence from which the jury could find that the defendant, as owner of the premises, had possession and control of the stairway. As the owner in control it was his duty to use reasonable care to keep it in as safe condition for its intended use as it was, or appeared to be, when the male plaintiff became a tenant. *Ward v. Blouin*, 210 Mass. 140. *Domenicis v. Fleisher*, 195 Mass. 281.

There was evidence that it was not in as good condition at the time of the injury as when the plaintiffs first moved in; that the defendant's attention had been called to the alleged "unsafe and dangerous condition" of the stairway at least two weeks before the accident; that the "treads" had gradually "worn way down to the scotia; . . . to a hollow, which had worn the nosing out;" that the nosing was worn through to what is known as the scotia; that the scotias "were broken in the centre where the treads were the most worn;" that the plaintiff, Maria C. Stagnaro, on January 22, 1912, as she testified, "started from her living apartment on the third floor to go to her office which was on the second floor; that she started to go slowly down the stairway in question with her hands on the rail; that when she got about on the middle of the stairs she put her right foot down and her left foot got caught on a broken step, 'got caught right in the middle, you know, in one of the steps, got caught, and I hold myself with my hands, but I went like that;' that she fell to the bottom of the stairs; that her foot was on the eighth step when she fell, 'the eighth going up, eighth coming down.'" On cross-examination she testified that she thought she really knew how she got hurt; that according to her story she was terribly injured; that the exact stair where her foot got caught was in the middle of the stairs; that no one had told her that the edge of the eighth stair was worn a little more than any of the others; that she caught her heel in the moulding which was underneath the edge of one of those treads which were in evidence, a broken step; that as she fell she struck on the post and fell round the corner and landed against the wall in the hall, near the office door.

Upon these facts and upon the evidence which the jury might derive from an inspection of the treads and scotia which were shown to the jury and exhibited to the court at the argument,

the presiding judge was warranted in submitting the issue of the female plaintiff's due care and that of the defendant's negligence to the jury.

It follows that he refused rightly to rule "that on all the evidence the plaintiffs were not entitled to recover."

*Exceptions overruled.*

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FRANCIS C. WELCH & others, trustees, *vs.* MARTHA B. PHILLIPS & others, trustees.

SAMUEL HAMMOND & others, trustees, *vs.* JOSEPH B. SPILLER.

SAME *vs.* JOHN McCANDLISH.

Suffolk. March 24, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Landlord and Tenant, Covenant to pay taxes. Contract, Construction.*

A lease was made for a term of twenty years from May 1, 1893. The lessee covenanted to pay "all the taxes . . . , except betterments, whether in the nature of taxes now in being or not which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term." The lessee paid the taxes assessed as of May 1, 1893, and the taxes assessed for each succeeding year until the last year of the term, which ended on April 30, 1913, but refused to pay the tax assessed as of April 1, 1913, asserting that he already had paid the taxes for twenty years and that St. 1909, c. 440, which changed the day of assessment from May 1 to April 1, was not contemplated by the parties when the lease was made. *Held*, that the lessee must comply with the terms of the express covenant he had made, although the result was that he had to pay the taxes for twenty-one years under a twenty year lease, it not being open to this court to modify the lease in accordance with a conjecture as to what agreement the parties would have made had they foreseen the likelihood of a change in the tax law.

DE COURCY, J. The predecessors in title of the respective parties to these actions, executed a lease of a building in Boston for a term of twenty years from May 1, 1893. The covenant therein relied upon is as follows:

"And the said parties of the second part for themselves and their representatives hereby jointly and severally covenant with the said parties of the first part, their representatives and assigns, that they will during said term . . . pay unto the said lessors,

their heirs and assigns . . . all the taxes and water taxes and assessments whatsoever, except betterments, whether in the nature of taxes now in being or not which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term."

The taxes sued for were lawfully assessed upon the demised premises by the city of Boston as of April 1, 1913. They were paid to the collector by the plaintiffs, after the defendants had refused to make payment of the amount.

Assuming, as the defendants contend, that the lease began on May 1, 1893, and terminated on April 30, 1913, and that they would not be liable for a tax assessed May 1, 1913, nevertheless, by the express terms of the covenant they are liable for the tax assessed upon and payable in respect of the premises on April 1. That assessment created a lien upon the premises substantially a month before the expiration of their term, which could be discharged only by payment of the tax, even though its actual payment was not due until after the termination of the lease. *Wilkinson v. Libbey*, 1 Allen, 375. *Richardson v. Gordon*, 188 Mass. 279.

There is no ambiguity about this covenant, to open the door for parol evidence. There are shown no circumstances or conditions existing at the time of the execution of the lease to indicate that the parties intended anything different from what their language clearly expressed. The real basis of the defendants' complaint is the St. 1909, c. 440, which took effect many years after the execution of the lease, and which advanced the date for assessing taxes from May first to April first. It is contended that they paid the taxes for 1893, the first year of the lease, and that this liability for the 1913 tax will result in their paying the taxes assessed upon the property for twenty-one years, although the term of the lease was only twenty years. Nevertheless the court is unable to relieve them from this seemingly inequitable result. It follows necessarily from the terms of the written lease which was executed by their predecessors in title. They agreed thereby to pay "all the taxes . . . whether in the nature of taxes now in being or not" upon the premises. Presumably the change in the tax law which makes them liable for the 1913 tax was not contemplated by them. But the payment

of that tax comes precisely within the terms of the contract they made, and we can only construe and enforce it. It is not for us to speculate as to what agreement they would have made if they had foreseen the likelihood of a change in the tax law, and to modify the lease in accordance therewith. *Codman v. Johnson*, 104 Mass. 491. *Central Wharf & Wet Dock Corp. v. India Wharf*, 123 Mass. 561, 567. *Bangs v. Potter*, 135 Mass. 245. *J. L. Hammett Co. v. Alfred Peats Co.* 217 Mass. 520.

The evidence offered by the defendants was immaterial in this action. For the reasons stated there was no error in the refusal to charge the jury as requested, or in directing the verdicts; \* and in each action judgment must be entered on the verdicts for the plaintiffs.

*So ordered.*

*G. W. Anderson*, for the defendants.

*B. Corneau*, (*R. F. Hooper* with him,) for the plaintiffs.

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GEORGE T. HUTCHINGS vs. JOHN S. VACCA & others.

ROY HUTCHINGS vs. SAME.

Worcester. March 27, 1916. — May 19, 1916.

Present: RUGG, C. J., BRALLEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Negligence*, In operating automobile. *Joint Tortfeasors.*

In an action for personal injuries sustained when the carriage in which the plaintiff was driving was run into by an automobile belonging to the defendant's brother and operated negligently by the defendant's son, there was evidence that the automobile was occupied by the defendant and his brother, his wife and his son, who were on an excursion for their common enjoyment, that the defendant's son was without a license and was "learning to drive the car," that the defendant with knowledge of his son's inexperience, shortly before the accident and as the car was approaching from behind the carriage in which the plaintiff was travelling, said, "Look out and keep on your right" and told him to "look out for the plaintiff's team because the team was right in the middle of the road" and that the driver "was trying to get on the left." *Held*, that it could be found that the directions given by the defendant were intended to control or influence the

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\* Verdicts for the plaintiffs were ordered by *Quinn, J.*



conduct of the defendant's son in operating the car and that the question of the defendant's negligence was for the jury.

In the same case there also was evidence that the defendant's brother, who owned the car, also gave directions to the defendant's son as its driver, and it was *held*, that this evidence, if believed, would not be a defence for the defendant, as it might be found that the defendant participated with his brother in the active management of the car.

**BRALEY, J.** The plaintiffs, while travelling by carriage on a public way, were injured by a collision with an automobile in which the defendant Ralph Vacca, the owner, the defendant Michael Vacca, the driver, and the defendant John S. Vacca, the brother of Ralph and the father of Michael, were travelling with Pia Vacca, the wife of John.

The jury upon conflicting evidence having found for the plaintiffs against all the defendants, the case is before us on the exceptions of John S. Vacca, who contends there was no evidence which warranted a verdict against him.

We shall refer to him as the defendant.

. If he was an occupant of the car as the guest of his brother and the accident was due to the negligence of the driver over whom the defendant exercised no direction or control, his request that a verdict be ordered in his favor should have been given. *Shultz v. Old Colony Street Railway*, 193 Mass. 309. But the unlicensed driver who operated the car at the time of the accident was the defendant's son and the jury further could find that he was "learning to drive the car" and that with knowledge of his inexperience and shortly before the accident as the car was approaching the plaintiffs' team in the rear, the defendant said: "Look out and keep to the right" and to "look out for the plaintiffs' team because the team was in the middle of the road," and that the driver "was trying to get on the left;" and that these directions were intended to control or influence the conduct of the driver in properly operating the car.

If the owner of the car also gave directions to the driver, yet the jury upon all the evidence further could find that the defendant and his relatives were engaged on an excursion for their mutual enjoyment and that in common with his brother he participated in the active management of the car. *Adams v. Swift*, 172 Mass. 521.

It is not contended that there was no evidence of the negligence

of the driver and the question of the defendant's liability was properly submitted to the jury.

*Exceptions overruled.*

The cases were submitted on briefs.

*T. L. Walsh, S. Friedman & T. F. Larkin*, for the defendants.

*F. B. Spellman*, for the plaintiffs.

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### COMMONWEALTH vs. STEPHEN CLAY.

Essex. March 27, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Salem*, Regulation of stands in public market. *Municipal Corporations*, By-laws and ordinances. *Licenses*. *Easement*, By prescription.

St. 1816, c. 103, gave power to the selectmen of the town of Salem, which now is retained by the city council of Salem under St. 1912, c. 559, Part I, § 63, to regulate stands in the market adjoining the market house in that city, and the city council in 1915 passed an ordinance providing that the board of control of the market house under the direction of the city council "may assign stands within said limits, for the sale of provisions and other articles," that "No person shall occupy any other stand than the one so assigned" and that "Such board of control may subject to the direction of the city council from time to time fix such sums as they may think proper as compensation for permission to stand in the market as aforesaid and shall issue permits to all persons so authorized." The board of control subject to the direction of the city council "established and fixed the sum of \$50 per year as compensation to stand in the market for the purpose of selling commodities." Upon a complaint for occupying a stand within the limits of the market without the license thus required, it was assumed in the absence of any contention to the contrary that, although the city council could not delegate the power of granting such licenses to the board of control, a body not named in the charter, the action of the board of control in establishing the amount of the license fee was approved by the city council, and it was *held*, that the question "whether the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market" must be answered in the affirmative.

In the same case it appeared that, before the passage of the ordinance in question, for "nearly one hundred years the premises have been used for a public market place and without charge to the public," but it also appeared that during this period ordinances had been passed "relative to the market house and the market," which presumably had been enforced, and it was *held*, that no uninterrupted adverse use had been shown which deprived the city of the use or control of property held for the benefit of the public.

COMPLAINT, received and sworn to in the First District Court of Essex on September 14, 1915, charging that the defendant on August 21, 1915, at Salem "did occupy a stand within the limits of the market, to wit, the area south of the market house for the sale of certain articles, to wit, peaches, the said stand not having been assigned to him by the board of control having supervision of the said market and area," in violation of an ordinance of the city of Salem which was passed on April 23, 1915, to take effect on May 3, 1915.

In the Superior Court before *Quinn, J.*, the case was submitted upon an agreed statement of facts which contained the facts that are stated in the opinion. After a jury was impanelled the counsel for the defendant stated that upon the agreed facts the jury would be justified in returning a verdict of guilty and suggested that the judge should order such a verdict. Thereupon the judge ordered the jury to return a verdict of guilty, which they did. With the consent of the district attorney, and at the request of the defendant's counsel, who stated that he simply wished to raise a question of law, "whether the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market," the judge reported the case for determination by this court. If the ordering of the verdict was correct, judgment was to be entered accordingly; otherwise, the verdict was to be set aside.

The revised charter of the city of Salem is contained in St. 1912, c. 559. Section 63 of Part I of that chapter is as follows: "Nothing contained herein shall be construed to affect the authority, power, privileges, rights and obligations created and given by any special act of the General Court and now vested in and exercised by the city of Salem, unless the same are inconsistent herewith."

The case was submitted on briefs.

*W. H. Southwick*, for the defendant.

*L. S. Cox*, District Attorney, for the Commonwealth.

*BRALEY, J.* If the ordinance for the violation of which he has been prosecuted is valid, the defendant concedes that the verdict of guilty must stand. By the provisions of the deed under which the city of Salem acquired title, the land granted was to be used "solely for a city way or public square or market and that no build-

ings are ever to be erected thereon." The defendant's first contention is that under the deed he had the right in common with his fellow citizens to use the premises for the sale of vegetables and fruits to the public without paying the "compensation for permission to stand in the market" required by the ordinance. The "market" is defined by § 2 of the ordinance as "the streets on the east and west sides of the market house in Derby Square and the area south of said house," which includes the portion occupied by the defendant while vending his commodities. But while no buildings are to be erected, and the granted premises must be kept open for a city market unless used as a public square or way, no restrictions or conditions are found limiting the power of the city to regulate the use of the market. It appears that, twenty years before the grant, the market house had been erected on land given to the town contiguous to the market "for the purpose of a market house and town hall to be erected thereon by said inhabitants for the use of the town, together with another piece of land and flats for the use of a fish market," and, a house having been built, the market after its acquisition has been used in connection therewith. By the St. of 1816, c. 103, the selectmen, when Salem was a town, were authorized "to make any rules and orders, not repugnant to the Constitution or laws of this Commonwealth, for the due regulation and government of the Market-house of said town, and of the Market-carts, waggons, sleds, sleighs, and other vehicles or carriages, used for marketing in said town, and of the marketmen who frequent said town for the purpose of buying and selling provisions and other commodities in open market; and the said Selectmen be, and hereby are authorized to appoint, from time to time, suitable places in the streets, squares and other public places in said town, in which all waggons, carts, sleds, sleighs, or other vehicles or carriages, containing provisions, wood, hay, barrels, or other commodities for sale in open market, shall stand, for the purpose of such sale; which rules and orders, when approved by the inhabitants of said town, in legal town-meeting assembled, shall be and become by-laws of said town, and shall be binding upon all persons whomsoever." The powers thus conferred on the selectmen have been transmitted by the city charters after Salem became a city, and the agreed facts state that from time to time ordinances relating to the market house and market have

been passed. St. 1836, c. 42. St. 1912, c. 559. *Cashman v. City Clerk of Salem*, 213 Mass. 153, 159.

The necessity of providing for some system of regulation and control of the market, affording protection to the public of the quality of food sold as well as giving an equal opportunity to vendors desiring to stand in the market, is amply shown by the record, and under these statutes there can be no doubt of the authority of the city council to pass ordinances for this purpose requiring a license and the payment of a license fee by those who desire to avail themselves of the privilege. *Commonwealth v. Fox*, 218 Mass. 498, 500. *Commonwealth v. Maletsky*, 203 Mass. 241. *Commonwealth v. Plaisted*, 148 Mass. 375, 381, 382. It has often been decided that the power to regulate may include the requirement of taking out a license and the payment of a license fee. *Commonwealth v. Plaisted*, 148 Mass. 375, 382, and cases cited. By § 3 of the ordinance the board of control of the market house under the direction of the city council "shall have charge of all carts, wagons, sleighs and other vehicles or carriages within the limits of the market, and may assign stands within said limits, for the sale of provisions and other articles. No person shall occupy any other stand than the one so assigned, nor keep any cart, wagon, sleigh or other vehicle or carriage, or horse or other beast, within said limits, for any longer space of time, or shall range or locate them in any other manner or form, than the board of control shall direct. Such board of control may subject to the direction of the city council from time to time fix such sums as they may think proper as compensation for permission to stand in the market as aforesaid and shall issue permits to all persons so authorized." And by § 4, "No person shall expose for sale or sell fruit, provisions, fish, meats, vegetables, nuts, patented articles of any kind in or from any cart, wagon, or other vehicles within the limits of the market without a permit therefor from the said board of control." It is stated in the agreed facts that "the board of control, subject to the direction of the city council, has established and fixed the sum of \$50 per year as compensation to stand in the market for the purpose of selling commodities" which rate has been enforced since the adoption of the ordinance. The board of control is a body not named in the charter, and without legislative authority the city council could not delegate this power.

*Commonwealth v. Plaisted*, 148 Mass. 375. *Lowell v. Archambault*, 189 Mass. 70, 73. It is, however, to be assumed, in the absence of any contention of the defendant to the contrary, that after establishing the rate, their action was approved by the city council. It follows, from what has been said, that the question of law reserved by the report "whether the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market" must be answered in the affirmative.

We express no opinion on the sections relating to the rental of stalls and cellars in the market house or the management of the fish market.

The defendant lastly urges that in common with other market men he had acquired a prescriptive right to stand in the market without payment of a license fee. It is true that, before the ordinance in question, for "nearly one hundred years the premises have been used for a public market place and without charge to the public." But it also is stated, that during this period ordinances have been passed "relative to the market house and the market" which presumably have been enforced and no uninterrupted adverse user has been shown depriving the city of property or the control of property held for the benefit of the public. *Attorney General v. Revere Copper Co.* 152 Mass. 444.

The entry must be judgment on the verdict.

*So ordered.*

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WILLIAM E. SKILLINGS vs. FRED B. COLLINS.

FRED B. COLLINS vs. WILLIAM E. SKILLINGS.

Suffolk. March 27, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Contract, Rescission. Sale, Warranty. Election. Automobile. Words, "Offer."*

In the provisions of the sales act relating to rescission for a breach of warranty contained in St. 1908, c. 237, § 69, cls. 3, 4, the word "offer" as used in relation to an offer to return the goods is synonymous with the word "tender."

Where the buyer of an automobile for the price of \$3,000 paid for it with another automobile agreed to be worth \$2,000, \$500 in cash and \$500 in notes, where

the seller gave an oral warranty that the \$3,000 car was in perfect running order, which it was not, and where the buyer, after repeated trials of the car and repeated unsuccessful attempts of the seller to put it in order, wrote to the seller, "This is a formal notice to you that I shall not accept the Chadwick car — which is, as you know, now at [a certain garage, the place of repair.] . . . it has never once been in anything like proper condition. I am done with it absolutely, and I would not have it at any price," but thereafter the buyer did not offer to return or tender the car to the seller and demand the return of the consideration until one month and four days after the date of his letter, it was held, that the buyer by his failure to return the car or to offer to return it within a reasonable time after he had knowledge that the warranty was broken had lost his right to rescind the sale.

PIERCE, J. About the first of April, 1913, the plaintiff Skillings in exchange sold to the defendant Collins, acting through one Clapp, a Premier Roadster automobile for the agreed price of \$2,000. *Howard v. Harris*, 8 Allen, 297, 299. *Carey v. Guil- low*, 105 Mass. 18. *Commonwealth v. Abrams*, 150 Mass. 393. As a part of the same transaction, Clapp, acting for Collins, sold to Skillings a Chadwick automobile for the price of \$3,000. Clapp received for the contract price \$500 in cash, \$500 in notes and \$2,000 as the value and agreed price of the Premier Roadster automobile sold to Collins. The first of these actions is brought by Skillings to recover \$3,000 upon a rescission of the contract. The second action is brought by Collins upon the notes.

The evidence warranted a finding that, before the sale and to induce the purchase, Clapp stated to Skillings that the car "was all right, that it was in perfect running order, that it had been thoroughly overhauled, that there were no defects in it and that there was nothing out about it;" that, during the negotiations and before the sale, Skillings said to Collins in the presence of Clapp, "that Clapp had stated that the car was in perfect running order, that there were no defects about it and that it was put perfectly and thoroughly in condition and overhauled;" and that Collins corroborated the statement.

The evidence warranted a finding that the car was out of repair, was not in perfect running order and had not been thoroughly overhauled at the time of the sale. "The defendant concedes that if the warranty alleged was proved . . . then the jury could have found a breach of it, that is, that the car was not in perfect condition."

The plaintiff Skillings alleges that he rescinded the contract, and seeks in this action a recovery of the price paid. To enable the plaintiff to recover back his purchase money, he must have notified the defendant within a reasonable time of his election to rescind and must have returned, or have offered to return, the automobile to the defendant in substantially as good condition as it was when transferred to him. St. 1908, c. 237, § 69, cl. 3. As was said by Shaw, C. J., in *Dorr v. Fisher*, 1 Cush. 271, 274, the vendee may "rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do every thing in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover." It has been held that the word "offer" as used in St. 1908, c. 237, § 69,\* is synonymous with the word "tender," and we so interpret it. *Noyes v. Patrick*, 58 N. H. 618. *Milliken v. Skillings*, 89 Maine, 180, 183. *Mundt v. Simpkins*, 115 N. W. Rep. 325. Williston on Sales, § 610.

The defendant Collins contends that the plaintiff knew of the defects in the car almost immediately after it was delivered, that he waived his right to rescind by keeping it with knowledge of its condition and that his letter of June 2, 1913, quoted later in this opinion, was an express election so to do. *Bassett v. Brown*, 105 Mass. 551, 557.

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\* The provisions referred to are contained in the sales act in St. 1908, c. 237, § 69, cls. 3, 4, and are as follows:

"(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time when the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

"(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price."



The answer to this contention is to be found in the admitted fact that it was understood that the machine should be taken to the garage of Clapp, or to that of Hersey on Talbot Avenue, in case of trouble, and that the bill should be sent to Clapp. Moreover, the plaintiff testified that he was told by Clapp and others that "a large portion of the trouble was due to the fact that he (Skillings) was not familiar with that type of car," and it might well be that at the time the letter was written he reasonably believed that such statement was true. But soon after the letter was written he was told by Collins "that the thing was all out of adjustment, it wasn't right at all, it was absolutely not at all as it should be."

Skillings then knew that the car was defective, and he stated after Clapp had told him that the car had been "made ship-shape and was running in good order," that he was thoroughly disgusted with the whole situation, that he did not see any point in his trying it at all, that he had been told a half dozen times by Clapp's people and the Talbot Avenue people that the thing was in first class order and would run all right, and then he would go and get it and have the same trouble with it.

After this conversation he tried the car again, and had the same kind of troubles with it as he had had for two months. He telephoned Clapp that "the deal was off;" that Clapp "could take the car; that he (Skillings) was through with it;" that "the car was out to Talbot Avenue and he (Clapp) could go and take it;" that "he thought the whole deal should be cancelled and that he should have his car."

On July 2, 1913, Skillings wrote to Clapp, "This is a formal notice to you that I shall not accept the Chadwick car — which is, as you know, now at the Talbot Ave. Garage, Dorchester. When I made the deal with you I had every right to assume that the car was in good condition, but for three months, despite the fact that your repair man and the Talbot Avenue Garage people have had the car practically all the time, it has never once been in anything like proper condition. I am done with it absolutely, and I would not have it at any price." Following this letter the car was not delivered to the defendant Collins, nor was there any offer to or tender of delivery to Collins or to Clapp, unless the letter in itself amounts to an offer to deliver. It

is clear that the letter expresses no more than a willingness or a proposal to return the car, and there is no evidence that Collins by word or act stated that he would refuse to receive the car if tendered.

No further tender or offer of tender of the car was made to the defendant Collins until August 6, 1913, when an attorney, Johnston, for Skillings, "told Collins that Skillings was through with the car, that he was ready to give it to Mr. Collins but wanted the Premier and the notes and the money which had been paid." On August 21, 1913, Collins stated to Johnston that he would not give back to Skillings his car, his money and his notes.

We are of the opinion that the facts disclose no legal excuse for the plaintiff Skillings's failure to deliver or to offer to deliver the car to the defendant Collins for the purpose of rescinding the sale between July 2, 1913, and August 6, 1913; and that upon the undisputed facts the plaintiff did not deliver the car or offer to deliver it to the defendant within a reasonable time after he had knowledge that the warranty was broken. *Bassett v. Brown, supra.*

The request that a verdict should be ordered for the defendant Collins should have been given.\* And in each case the entry must be

*Exceptions sustained.*

*J. E. Hannigan, for Collins.*

*D. H. Fulton, for Skillings.*

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\* This request was refused by Fox, J. The action was not brought to recover damages for a breach of warranty. The judge gave at the request of Collins the following instruction: "If after knowledge of the facts the plaintiff — that is Skillings — elected to affirm the contract he cannot recover in this suit. That request I give you because this suit is based on the disaffirmance of the contract, and if a party with his knowledge of the facts elected to affirm the contract he cannot now disaffirm the contract. I give you that." The judge submitted the cases to the jury. In the first case the jury returned a verdict for the plaintiff Skillings in the sum of \$2,537.08 and in the second case returned a verdict for Skillings as defendant. Collins alleged exceptions.

JOHN J. HALLORAN, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 28, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Evidence, Opinion:* experts, Remoteness, Competency. *Negligence, Street railway. Practice, Civil,* Conduct of trial: curing error in admission of evidence. *Words,* "Sharp curve."

In an action by an administrator against a corporation operating a street railway for causing the death of the plaintiff's intestate when he was a passenger on a car of the defendant and the car was entering upon a curve, where the plaintiff had introduced evidence of a rule of the defendant requiring motormen in going round "sharp curves" not to run over four miles an hour, the plaintiff was permitted, against the defendant's objection, to ask an expert the question, "Assuming that the radius of this curve is one hundred and fifty feet to one hundred and sixty, as you have stated, whether or not this is a sharp curve?" and the witness answered, "Yes." *Held,* that it was error to allow the question to be put to the expert, as the words "sharp curve" were to be understood by the jury according to their common and accepted usage and not in a mathematical or scientific sense.

In the same case the presiding judge of his own motion called the attention of the jury to the fact that the opinion of the expert witness above mentioned was immaterial and ordered that the question and answer should be stricken out and instructed the jury not to consider it, saying to them, "It is a practical question, both in its aspect as regards the conduct of the motorman and as regards what you say about that curve. You have seen the curve. It is for you to say whether it comes under the definition of a sharp curve or not." *Held,* that the error in the admission of the evidence was cured fully by the explanation and instruction of the judge.

In the same case the defendant offered evidence to show the nature of the curve with reference to the ease with which cars could go round it without jerks and in this connection offered to show that the curve was constructed according to the recommendations contained in a certain handbook so that there would be a minimum of jerk and jolt. The presiding judge excluded the evidence. *Held,* that its exclusion was proper, as the judge rightly might have considered it too remote.

In the same case it was admitted that the plaintiff's intestate five years before the accident had met with an injury by which his skull was fractured, and the defendant then offered to show by expert testimony that a fractured skull impairs equilibrium, that habits of alcoholic drinking, whether constant or intermittent, still further impair equilibrium and that the intestate since the fracture of his skull had drunk intoxicating liquors and had been drunk from time to time. The judge excluded the evidence. No evidence was offered to show that the balance of mind or body of the intestate was less than normal at the time of the

accident or that he was under the influence of liquor at that time. *Held*, that the evidence was excluded properly.

In the same case the defendant offered to show "the number of cars that would be passing by at this time and the time between the cars." No offer was made to show the number of cars that in fact passed over that street on that day at that time. The judge excluded the evidence. *Held*, that the exclusion was proper.

PIERCE, J. This is an action of tort, brought by the administrator of Daniel M. Halloran to recover damages under the St. 1907, c. 392, for the death of the intestate, alleged to have been caused through the negligence of the defendant while the intestate was a passenger on one of the defendant's cars on September 17, 1913, about 7:10 A. M. on Pleasant Street, Dorchester, and when the car was entering upon a curve.

During the trial, subject to the defendant's exception, the plaintiff was permitted to ask an expert witness the following question: "Assuming that the radius of this curve is one hundred and fifty feet to one hundred and sixty, as you have stated, whether or not this is a sharp curve?" The witness answered, "Yes." The question had reference undoubtedly to evidence previously introduced by the plaintiff, to the effect that a rule of the defendant required motormen in going round sharp curves not to run over four miles an hour. The words "sharp curve" in the rule in their signification are not referable to a definition of them in a mathematical or scientific sense, but are to be understood in their common and accepted usage.

After the evidence was received, the presiding judge\* of his own motion called the attention of the jury to the fact that the opinion of the engineer was immaterial, directed that the evidence should be stricken out and that it should not be considered by the jury, and said, speaking to the jury, "It is a practical question, both in its aspect as regards the conduct of the motorman and as regards what you say about that curve. You have seen the curve. It is for you to say whether it comes under the definition of a sharp curve or not." By this explicit and unmistakable explanation and instruction, the error in the reception of the testimony was fully cured.

The defendant offered testimony to show the nature of the curve with reference to the ease with which cars could go round it with-

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\* *Lawton*, J. The jury returned a verdict for the plaintiff in the sum of \$5,000; and the defendant alleged exceptions.

out jerks; that it was constructed in accordance with certain recommendations contained in a Hand Book for Street Railway Engineers, Chapter III, Transition Curves, and that as so constructed there would be a minimum of jerk and jolt. The evidence was properly excluded; its force was theoretical and of little practical value in assisting the jury to weigh and to determine the truthfulness of the testimony of witnesses or to discredit what the jury had seen and had learned through their own eyes. The presiding judge rightly may have considered it as too remote.

It was admitted that in 1908 the intestate met with an injury in which his skull was fractured. The defendant then offered to show by expert testimony that a fractured skull impairs equilibrium; that alcoholic habits or habits of drinking, whether constant or intermittent, still further impair equilibrium, and that the intestate since the fracture of 1908 had drunk intoxicating liquors and had been drunk from time to time.

No evidence was offered of a universal and unvarying rule that loss of equilibrium follows, without exception, every fracture of the human skull regardless of its nature and degree; nor was there evidence to show the nature and the degree of the fracture of the skull of the intestate, or to prove that he had in fact a balance of mind and body less than normal; or that at the time of the accident he was intoxicated or under the influence of liquor. There is no evidence that the motorman knew of the presence upon the car of the intestate, or that his conduct in the driving of the car was influenced in the slightest degree by a consideration of the presence thereon or absence therefrom of a person or persons of like characteristics. The evidence was properly excluded.

The defendant offered to show "the number of cars that would be passing by at this time, and the time between the cars." No offer was made to show the number of cars that in fact passed over that street on that day at that time. In other words, the offer was to show the number of cars scheduled to run on that day and the time allotted to the running. The evidence was properly excluded.

The exceptions have been considered in the order of their discussion by the defendant, and must all be overruled.

*So ordered.*

*J. E. Hannigan, for the defendant.*

*J. F. O'Connell, for the plaintiff.*

## THERESA M. MOORE vs. JOHN J. O'HARE, executor.

Suffolk. March 29, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; PIERCE, JJ.

*Gift. Trust, Creation.*

The aunt in this country of a girl seven years of age then living in Ireland deposited in a savings bank in her own name as trustee for the girl \$200 that belonged to the girl as the only next of kin of her deceased mother, and afterwards deposited in this account \$350 to which was added the accumulated interest. Later when the girl came to this country the aunt showed her the bank book and told her that the money that her mother had left was to be put in the bank in trust for her. For more than seven years the aunt collected wages earned by the girl, amounting to \$1,190, and told the girl that she was saving them for her and was putting them with her mother's money so that the girl should have that in trust. In fact she deposited in the trust account \$350 of the wages and mingled the balance with her own money. The aunt stated to the girl that she could have the money in the trust account if anything happened to the aunt and that the account would be something that the plaintiff always could have. In a suit in equity brought by the girl after the aunt's death against the executor of her will, it was *held*, that these facts with the inferences naturally to be drawn from them were sufficient to justify, if not to require, a finding that the account in the savings bank became a completed gift when the plaintiff's aunt first informed her that the original deposit of money in that account was the money that had belonged to the plaintiff's mother, and that the gift was accepted by the plaintiff. In the same case it was *held*, that the plaintiff's wages, which were collected by the defendant's testatrix for a period of seven years with the declared purpose of holding them for the plaintiff, were impressed with a trust that was not terminated by their being deposited in the savings bank fund nor by their being mingled with other money of the defendant's testatrix.

BILL IN EQUITY, filed in the Superior Court on February 10, 1915, against the executor of the will of Mary Dignan, late of Boston, praying for an accounting by the defendant as executor for a fund held in trust by Mary Dignan for the benefit of and belonging to the plaintiff as stated in the opinion.

In the Superior Court the case was heard by *Wait, J.*, the evidence having been taken by a commissioner appointed under Equity Rule 35, to which was annexed the deposition of Mrs. Rose Brown Snow. The judge made a memorandum of findings of fact and ordered a decree for the payment to the plaintiff of the amount of \$1,088.39 withdrawn by the defendant's testatrix on March 20, 1890, of which \$1,000 was immediately redeposited

by her in the Provident Institution for Savings, and also the amount of \$700 of wages unexpended, held for the plaintiff Theresa; with interest on both amounts computed from March 20, 1890, at four and one half per cent per annum, compounding in the manner of savings bank deposits with semiannual rests on January 1 and July 1 of each year; and that the decree should be without costs to either party.

Later the judge made a final decree in accordance with this order, directing the payment by the defendant as executor of the will of Mary Dignan to the plaintiff of the sum of \$5,388.67 with interest at the rate of six per cent per annum computed from February 10, 1915, the date of the filing of the bill, without costs to either party. The defendant appealed.

The case was submitted on briefs.

*C. Toye*, for the defendant.

*E. A. McLaughlin*, for a legatee under the will of Mary Dignan.

*J. H. Kenney & C. J. Martell*, for a devisee and for the residuary legatee under the will of Mary Dignan.

*S. L. Whipple, W. R. Sears & H. W. Ogden*, for the plaintiff.

PIERCE, J. Upon the testimony reported by the commissioner and the deposition of Mrs. Snow, after making due allowance for her manifestly somewhat impaired memory, we find and adopt the conclusions of fact found by the trial judge.

There is evidence that the testatrix, Mary Dignan, hereafter called the defendant, on April 8, 1874, deposited \$200 in the Provident Institution for Savings in Boston in her name as trustee for Theresa Healey (the plaintiff) then seven years of age and living in Ireland; that this sum of \$200 was money actually belonging to Theresa Healey having come from the estate of her deceased mother, Elizabeth Healey, who died in December, 1873, in Boston, intestate, the plaintiff being her sole heir at law and next of kin; that between April, 1874, and May, 1881, the time when the plaintiff came to this country, the defendant deposited in the trust account an additional sum of \$350 to which was added the accumulated interest; that upon the plaintiff's arrival in this country she entered the service of a Mrs. Crombie, where the defendant was employed; that between May and October, 1881, the defendant showed the bank book to the plaintiff and told her that the money the plaintiff's mother had left was to be put in the bank

in trust for her; that the defendant collected wages earned by the plaintiff between 1882 and 1889, amounting to \$1,190, stating that she was saving them for the plaintiff and "was putting it [them] with my mother's money so that I should have that" in trust; that of these wages the defendant deposited in the trust account the sum of \$350 and mingled the balance, \$700, with her own funds and never accounted for them; that thereafter the defendant frequently stated to the plaintiff that the wages which she received were being put in trust and saved for the plaintiff; that the defendant made like statements to Mrs. Snow, and stated to her attorney "that originally she had deposited a sum of money in that institution [the Provident Institution for Savings] in trust for her niece, Theresa Healey; that she went to the Provident Institution and told the receiving clerk that she desired to open an account; to have the use of that account during her lifetime; to add to it or withdraw from it, including the interest, and that after her death it was to go to her niece, Theresa Healey;" that on March 20, 1890, the defendant withdrew \$1,088.39 then on deposit in the savings bank and immediately redeposited in the same bank in her own name \$1,000; that there remained unexpended of the wages held for the plaintiff \$700 in addition to the \$1,088.39 withdrawn; and that the plaintiff had reason to believe and did believe the trust fund remained intact until after the death of the defendant.

The facts and the inferences of fact naturally to be drawn therefrom are sufficient to justify and require a ruling that the account in the savings bank became a completed gift in 1881 when the defendant made known to the plaintiff that the money first deposited in 1874 was money of the mother of the plaintiff, that the deposit in its form was in trust for the plaintiff, that the defendant stated that the plaintiff could have it if anything happened to the defendant and that it would be something that the plaintiff could always have. *Supple v. Suffolk Savings Bank*, 198 Mass. 393.

That the gift was then accepted may be inferred from the fact that a part of the deposit belonged originally to the plaintiff subject to the administration of the estate of the mother and that it was a benefit and not a burden to the plaintiff to receive it. *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159. *Alger v. North End Savings Bank*, 146 Mass. 418.



The wages of the plaintiff, collected by the defendant for a period of over seven years before 1890, under a declaration of purpose to conserve and care for them in the interest of the plaintiff, were impressed with a trust which was not divested upon their deposit in the savings bank fund or upon their being mingled with other moneys of the defendant. See *Jones v. McDermott*, 114 Mass. 400; *Campbell v. Whoriskey*, 170 Mass. 63; *Pierce v. Perry*, 189 Mass. 332, 335.

There was no error in the refusal to make the rulings and findings requested by the defendant. It follows that the decree of the court should be affirmed.

*Decree accordingly.*

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UNION INSTITUTION FOR SAVINGS IN THE CITY OF BOSTON  
vs. CITY OF BOSTON.

Suffolk. March 29, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Boston*, Street commissioners. *Street Commissioners*. *License*. *Nuisance*. *Contract*, What constitutes. *Way*, Public: license to use for private purpose.

A permit granted by the board of street commissioners of the city of Boston under St. 1913, c. 680, to erect and maintain a post with a clock thereon set in the sidewalk of a public street of that city, without limitation as to time and without express reservation of a power to revoke the permit, is a revocable license, and the right granted does not become a contract by the erection of a post and clock in accordance with its terms.

In this Commonwealth a right granted to a private person to use a public street for a private purpose is a mere license revocable at pleasure.

BILL IN EQUITY, filed in the Superior Court on September 24, 1915, praying that the city of Boston and its board of street commissioners might be enjoined from removing a post and a clock thereon set in the public sidewalk on Tremont Street in Boston at the corner of Lagrange Street upon land of which the plaintiff owned the fee, the plaintiff maintaining such post and clock under a permit granted by the board of street commissioners on January 14, 1914.

In the Superior Court the case was submitted upon an agreed

statement of facts to *McLaughlin*, J., who made an order for the issuing of the injunction and at the request of the parties reported the case for determination by this court.

*H. V. Cunningham*, for the plaintiff.

*J. P. Lyons*, for the defendant.

PIERCE, J. The contention of the plaintiff, that it has an irrevocable franchise to occupy a portion of the public highway because the permit to erect a post with a clock thereon was granted without limit as to time and without reservation in the board of a power to revoke, cannot be sustained.

The board derived its entire authority from St. 1913, c. 680. While this statute authorized the board as agents of the Commonwealth to grant permits to occupy the public ways for the purposes enumerated and to adopt rules and regulations governing the use of the same, it did not purport to empower the board to surrender its control and supervision of public highways for an indefinite period of time, and the absence therefrom of express authority is equivalent to the denial of the right.

The further contention that "The erection of the clock under this permit constituted a contract which cannot be impaired, as well as a vested property right which cannot be taken from the plaintiff, except by the power of eminent domain," necessarily assumes that the board, as agents of the Commonwealth, by necessary implication is authorized by the statute to contract to give up and to surrender its and the Commonwealth's control of the full use of public highways. That such authority is not implied as necessary to the proper exercise of the power conferred is obvious. *McQuillin*, Mun. Corp. § 1319, and cases cited. The right granted is not a franchise or a contract, but is a license which legalizes that form of obstruction in a public highway which otherwise would constitute a nuisance. *Cushing v. Boston*, 128 Mass. 330. *Sawyer v. Davis*, 136 Mass. 239.

However it may be in other States, it is plain that in this Commonwealth the right granted to a private person to use the streets for private purposes is but a mere license, revocable at pleasure of the grantor. *McQuillin*, Mun. Corp. § 1319. *Forbes v. Detroit*, 139 Mich. 280.

The cases which deal with police regulation of the use of private property are distinguishable and furnish no support to the

plaintiff's contention. See *Lowell v. Archambault*, 189 Mass. 70; *Worcester Board of Health v. Tupper*, 210 Mass. 378.

It follows upon the terms of the report that the bill must be dismissed.

*Decree accordingly.*

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JOHN NOBLE, receiver, vs. ARTHUR G. BROOKS.

Suffolk. March 29, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Landlord and Tenant. Mortgage, Of real estate. Receiver. Assignment. Practice, Civil, Amendment. Supreme Judicial Court.*

The term of a lease in writing of an apartment in a building was described as follows:

"One year from the first day of September one thousand nine hundred and thirteen, . . . and thereafter from year to year until one of the parties hereto shall, on or before the first day of July in any year, give to the other party written notice of his or her intention to terminate this lease on the last day of the following August, in which case the term hereby created shall terminate in accordance with such notice." *Held*, that the lease could be terminated only by a notice given in accordance with its terms or by operation of law.

A mortgage, in the usual form, of real estate which is subject to a lease operates as an assignment of the lease.

Where the mortgagee of real estate which is subject to a lease enters and takes possession of the property for a breach of condition and gives notice to the lessee, he is entitled to all rent thereafter accruing and the lease remains in full force and effect until terminated in accordance with its terms or by operation of law.

Where a receiver is appointed to take possession of real estate that is subject to a lease, and a mortgagee of the property, who previously on a breach of condition had taken possession of it subject to the lease, surrenders the property to the receiver, this does not operate as an assignment of the lease to the receiver, and in suing on a covenant of the lease for accrued rent the receiver must sue in the name of the lessor.

Where an action on a covenant in a lease to pay rent was brought by a receiver in his name as receiver, and it was held that the defendant was liable on the covenant to the lessor whose property was in the hands of the receiver but it was plain that the receiver was not an assignee of the lease, this court under St. 1913, c. 716, § 3, gave the plaintiff leave to amend by substituting the name of the lessor as plaintiff and ordered that, upon the filing of the amendment, a finding for the plaintiff should be affirmed.

CONTRACT with two counts, the first upon a covenant in a lease in writing for rent of suite 16 in the Whittier Building in Cambridge due on the first days of April and May, 1915, with interest thereon,

and the second count for use and occupation of the same premises for the month of April, 1915, and until May 20, 1915, according to an account annexed, claiming \$47.50 damages and eighty-five cents for interest to the date of the writ. Writ in the Municipal Court of the City of Boston dated July 26, 1915.

The case was presented to a judge of the Municipal Court of the City of Boston upon an agreed statement of facts, the substance of which was as follows:

The lease above mentioned was made and dated on August 1, 1913, between the defendant and the trustee of the Associated Trust. The description of the term of the lease is quoted in the opinion.

The defendant entered under the lease and paid rent thereunder at the rate of \$28.50 a month in advance to the trustee of the Associated Trust, to and including June 30, 1914. On December 1, 1913, the trustee of the Associated Trust gave to the Cambridge Realty Company a mortgage of the Whittier apartments in which the suite was. The mortgage was in the usual form of real estate mortgages and contained the provision that "until default in the performance or observance of the condition of this deed, I and my heirs and assigns may hold and enjoy the granted premises and receive the rents and profits thereof." On or about June 24, 1914, the Cambridge Realty Company as mortgagee entered upon the Whittier apartments and took possession thereof for breach of the conditions in the mortgage, and on the same day the defendant received a notice from the Cambridge Realty Company that thereafter "your rent will be payable to us, at the same rate which you are now paying."

On July 1, 1914, the defendant received from the Associated Trust the following notice: "We hereby authorize you to pay all rent due beginning July 1st to the Cambridge Realty Company, in accordance with a transaction which we have with them, which is only temporary."

After the receipt of these notices, the defendant paid \$28.50 a month in advance for occupation of suite 16, to the Cambridge Realty Company, for the months of July, August, September, October, November and December, 1914.

On August 27, 1914, the plaintiff in this action was appointed receiver of the Associated Trust by decree of the District

Court of the United States for the District of Massachusetts, directing him as receiver among other things to take possession of all properties of the Associated Trust and to collect the income thereof, and ordering all persons owing money to the Associated Trust to pay it to the receiver.

The Cambridge Realty Company surrendered possession of the Whittier Apartments to the receiver as of January 1, 1915, and some time in December, 1914, the superintendent of the Whittier Apartments notified the defendant orally that the Cambridge Realty Company had surrendered possession of the estate to the receiver and that he should pay the receiver thereafter for the occupation of the premises.

Thereafter the defendant paid to the plaintiff \$28.50 a month on the first day of each month from January 1, 1915, to March 1, 1915, for suite 16 for the months of January, February and March.

On February 26, 1915, the defendant delivered to the plaintiff as receiver a letter or notice as follows: "You are hereby notified that I shall on the 31st day of March next quit and deliver up the premises now occupied by me as your tenant, namely Suite 16 in the Whittier Apartments, 885 Massachusetts Avenue, Cambridge, Mass."

The plaintiff on February 27, 1915, replied to the foregoing letter or notice as follows: "I cannot accept this notice. Your tenancy is under a lease which does not terminate until August 31, 1915. I shall be obliged to hold you responsible for the rent until that date."

On March 11, 1915, the defendant vacated suite 16 and moved to another building.

On May 20, 1915, the trustees of the Associated Trust, acting under permission given by the District Court, conveyed the estate 885 Massachusetts Avenue, "subject to said mortgage and to all existing leases upon said premises," to the Whittier Realty Company, a Massachusetts corporation.

The defendant before the arguments asked the judge to make the following rulings:

"1. Upon all the evidence in the case as a matter of law the plaintiff cannot recover.

"2. The Cambridge Realty Company after taking possession

as mortgagee on July 1, 1914, was entitled to rent from the defendant by privity of estate only, and not by privity of contract.

"3. The Cambridge Realty Company was not an assignee of the lease.

"4. The Associated Trust in assenting to payments by the defendant to the Cambridge Realty Company as mortgagee by letter dated July 1, 1914, in effect gave notice to the defendant that the contract of lease was at an end."

The judge refused to make the first and fourth rulings requested, but made the second and third.

The judge found for the plaintiff in the sum of \$59, and at the request of the defendant reported the case to the Appellate Division.

The Appellate Division made an order that the report be dismissed; and the defendant appealed.

*W. R. Bigelow*, for the defendant.

*S. Vaughan*, (*J. Noble* with him,) for the plaintiff.

**BRALEY, J.** The lease having described the term as "One year from the first day of September one thousand nine hundred and thirteen to August 31st, one thousand nine hundred and fourteen and thereafter from year to year until one of the parties hereto shall, on or before the first day of July in any year, give to the other party written notice of his or her intention to terminate this lease on the last day of the following August, in which case the term hereby created shall terminate in accordance with such notice," it could not be ended by either the lessor or the lessee except in accordance with these provisions or by operation of law.

The subsequent mortgage of the leased premises undoubtedly operated as an assignment of the lease. *Burden v. Thayer*, 3 Met. 76. *Russell v. Allen*, 2 Allen, 42, 43. And the mortgagee, having entered and having given notice to the tenant, thereafter was entitled to all accruing rent. *Mirick v. Hoppin*, 118 Mass. 582, 587. *Adams v. Bigelow*, 128 Mass. 365, 366. But, as the mortgagee never terminated the lease, it remained in full force and effect at the time possession of the premises was surrendered to the plaintiff as receiver of the lessor. The defendant having continued in occupation and there being no evidence that the required notice has been given, the fourth request was refused properly.

The first request, that upon all the evidence the plaintiff as

matter of law cannot recover, is also disposed of by what has been said, except as to the defendant's contention that the action cannot be maintained by the receiver in his own name.

It is plain that he is not an assignee of the lease and the action should have been brought in the name of the lessor. *Wilson v. Welch*, 157 Mass. 77, 80, 81.

The merits having however been fully determined, the plaintiff is given leave to amend; and upon the filing of the amendment the order dismissing the report is affirmed. St. 1913, c. 716, § 3.

*So ordered.*

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JOHN H. GOULDING, administrator, & others *vs.* INHABITANTS  
OF CONCORD.

ELMINA D. HUBBARD, executrix, *vs.* SAME.

Middlesex. March 29, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Way*, Public: relocation. *Damages*, For property taken or impaired under statutory authority.

Where, before a vote was passed by a board of county commissioners relocating and widening a public road in a town, the road commissioners of the town caused sand to be dumped over the whole width of the proposed relocation and sloped the sand against the retaining walls of an old causeway, and, after the order of relocation had been passed by the county commissioners, the same road commissioners of the town restored these slopes of sand where they had been washed away over the whole width of the road as relocated, it was *held*, that these acts constituted as matter of law an entry and taking possession within the meaning of R. L. c. 48, § 92, and also within the meaning of § 28 of the same chapter, which provides that a petition for the assessment of damages by a jury must be filed before the expiration of one year "from the day when the highway is entered upon and possession taken for the purpose of constructing the same."

TWO PETITIONS, filed in the Superior Court on May 5, 1914, under R. L. c. 48, §§ 27, 28, 109, for determination by a jury of the damages caused to property of the petitioners by the relocation of Sudbury Road in Concord by the county commissioners of the county of Middlesex.

To each of the petitions the respondent filed a demurrer and a motion to dismiss on the following grounds:

"First. That it appears from an inspection of said petition that it is a petition for the assessment by a jury of damages sustained by the petitioners by reason of the taking of their property under an order of the county commissioners of Middlesex County for the relocation of Sudbury Road in said Concord, which order was made December 28, 1910, and it further so appears that no possession was taken for the purpose of altering said Sudbury Road until subsequent to July 10, 1913; by reason of which fact so alleged in accordance with the provisions of R. L. c. 48, § 92, said order of December 28, 1910, became void.

"Second. That any possession taken for the purpose of altering said road in accordance with said order of December 28, 1910, must have been taken in accordance with said section of said chapter, in order to prevent said order from becoming void, on or before December 28, 1912, and that in accordance with section 28 of said chapter any petition for the assessment by a jury of damages sustained by reason of said order could only be filed on or before December 28, 1913, whereas said petition was not filed until May 5, 1914."

In each of the cases *Dana, J.*, made an order overruling the demurrer and denying the motion to dismiss "without prejudice," and the cases then were tried together before *Dana, J.*, with a jury.

The evidence is described in the opinion. The jury found, in answer to special questions submitted to them by the judge, that the petitioners Goulding sustained damages in their property by the relocation of Sudbury Road on December 28, 1910, in the sum of \$458 and that the petitioner Hubbard sustained like damages in the sum of \$611. The judge then reported the cases for determination by this court. If his rulings of law were correct, judgment was to be entered for the respective petitioners in the sums assessed by the jury with interest from November 1, 1913.

A portion of the judge's report was as follows:

"The respondent contended that this work of placing these scrapings on the sand slopes which were on lands of Abbott and Bigelow included within the boundaries of the relocated forty foot road but not within the boundaries of the old two rod road constituted as a matter of law an entry for the purpose of constructing a part of the laying out of Sudbury Road under the order of relocation made December 28, 1910; that such an entry in accordance



with R. L. c. 48, § 92, must be deemed a taking possession of all the lands included in said order; that the lands of the petitioners included in said order must therefore be deemed to have been taken possession of in March or April, 1911; and that the petitions, not having been filed until May 19, [5,] 1914, were not filed within one year as required by R. L. c. 48, § 28. I declined to rule that this work constituted such an entry and submitted to the jury the following question to which the jury answered 'No.': '5. Was an entry for the purpose of the construction of a part of the laying out of Sudbury Road under the order of relocation dated December 28, 1910, made in March or April, 1911, on land, near the bridge?' If I ought to have ruled in accordance with the contention of the respondent, then judgment is to be entered for the respondent in these two cases. The respondent also contended that if this work did not constitute such an entry, no such entry was made until October, 1913, as alleged in the petitions and as shown by all the evidence; that in accordance with said § 92 the relocation became void at the end of two years from December 28, 1910; that the petitions could not therefore be maintained; but that the petitioners should be left to their common law remedies for any entry upon their lands made in October, 1913, and thereafter. This contention was presented by motions to dismiss the petitions made before the trial and by requests for rulings at the close of the evidence. I declined to grant the motions or to rule as requested. If I ought to have granted said motions or to have ruled as requested, then judgment is to be entered for the respondent in these two cases without prejudice to the prosecution of other remedies."

R. L. c. 48, § 92, is as follows: "The laying out or alteration of any way under the provisions of this chapter shall be void as against the owner of any land over which the same is located, unless possession is taken of such land, for the purpose of constructing or altering such way, within two years after the right to take such possession first accrues; or, if a different time is agreed upon by the authorities laying out such new way or making such alteration and all the owners of the land over which such way as laid out or altered extends, such time shall be specified in the return or report of such laying out or alteration, which shall become void, as before provided, only in case possession is not taken for

the purpose of constructing such way within the time thus agreed and specified; but an entry for the purpose of constructing any part of the laying out or alterations shall be deemed a taking of possession of all the lands included in the laying out or alterations."

R. L. c. 48, § 28, is as follows: "Such petition to the commissioners for a jury may be made at any time before the expiration of one year, in the case of the taking of land, from the day when the highway is entered upon and possession taken for the purpose of constructing the same, in the case of specific repairs, from the day when the work is actually commenced on the way, and in all other cases, from the date of the order providing for the same; but if before the expiration of the year a suit is instituted wherein the legal effect of the proceedings of the commissioners is drawn in question, such application may be made within one year after the final determination of the suit."

*P. Keyes*, for the respondent.

*E. I. Smith*, (*A. J. Doherty* with him,) for the petitioners.

PIERCE, J. These are petitions for the assessment by a jury of damages to the real estate of the petitioners caused by the relocation by the county commissioners of Sudbury Road in Concord.

The petition for the relocation was filed on February 14, 1910. A public hearing was held on April 4, 1910, and a relocation was decided upon. The bound stones were set during the summer of 1910 for a road forty feet wide, the old road having been only two rods wide. After the stones were set and before Christmas, 1910, the road commissioners of Concord at an expense of \$342.80 caused sand to be dumped over the old perpendicular retaining walls of a causeway forming a part of the length of the old road so as to form slopes to support those walls which were to be used to carry a higher and wider causeway. The slopes and causeway covered the whole forty feet width of the relocated road. The order of relocation was made on December 28, 1910. In March and April, 1911, work costing about \$234 was performed by the road department of Concord in restoring these slopes which had settled and become more or less washed away during the winter and in spreading upon them scrapings from the roads of the town so as to prevent further washing away.

"The road commissioners submitted to the town a printed report of their administration of the road department to March

1, 1911. This report was accepted at the annual town meeting held in April, 1911. It contained this paragraph: 'It cost \$342.80 to widen Sudbury Road Causeway, filling on each side. The road was very narrow where it approaches Heath's Bridge in both directions, and it was impossible, if not dangerous, for large teams to pass.' "

The question at issue between the parties is whether the respondent took possession of any part of the land included in the relocation in the spring of 1911, for the purpose of constructing the way. The facts are undisputed; there could be no issue of fact for the jury, and the respondent was entitled to a ruling of law upon the question whether the acts of the road commissioners did constitute such a taking of possession and such an entry as is contemplated under R. L. c. 48, § 92.

When the attending facts are considered and viewed in connection with the admitted fact that the road commissioners who put the street scrapings upon the slopes were the same public officers who widened the way eight feet and built the slopes thereto between the time of the decision of the county commissioners to relocate the way and the entry of its formal order and decree, we are of the opinion that the restoration of the slopes, washed away during the winter of and spring following their construction, was clearly an entry under the statute.

This conclusion finds support in the reasoning of Gardner, J., in *Wilcox v. New Bedford*, 140 Mass. 570, which, changing the date, reads: "The entry upon the land must be after the taking, and not before; and, if the only possession taken by the city was before [December 28, 1910,] when the extension was laid out, it will not avail the defendant. It would not be the act required by the statute, and would operate as ineffectually as if done after the lapse of the two years therein mentioned. Nevertheless, we think, if the city, in contemplation of laying out a street, and while legal proceedings therefor are in progress, takes possession of the land, and works thereon for the purpose of constructing the way, that these acts are not without significance. If, after the laying out, nothing more is done by the city within two years, then the previous possession taken and work done go for nothing. But such previous possession and work give some meaning to the possession taken by the city after the laying out, and, in view of such

previous acts, less evidence would be required to show that the city, after the laying out, took possession for the purpose of constructing the way. These acts of the city, if found to be done before the laying out, for the purpose of constructing the way, give character and effect to the possession taken afterwards, and it can be seen, in the light of these previous entries upon the land and work thereon, for what the city afterwards took possession, whether for the purpose of constructing the way, or for other and foreign purposes."

It follows that the presiding judge should have ruled as contended by the respondent. And by the terms of the report, judgment is to be entered for the respondent in both cases.

*So ordered.*

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JOSEPH LEWENBERG & another vs. RICHARD JOHNSON & another.

Suffolk. March 30, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Contract, Construction, Reformation. Covenant, Against incumbrances. Equity Jurisdiction, To reform instrument in writing, Specific performance. Words, "Incumbrance."*

Where in a contract for the sale and purchase of a parcel of land the seller agreed to convey "a good title free from all incumbrances" and the contract contained the provision that, "If [the seller] shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease, but the acceptance of a deed and possession by [the buyer] shall be deemed to be a full performance and discharge hereof," and where the seller in good faith conveyed the land by a quitclaim deed which was accepted by the buyer, who, after he had taken possession under his deed and had made improvements, found that a natural watercourse ran across the rear of two of the lots embraced in the parcel and that certain rights in this watercourse were claimed by a town under a statute relating to surface drainage, the buyer cannot maintain a suit in equity to enforce the specific performance of the contract of purchase or to reform the deed by inserting in it a covenant against incumbrances, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the stipulated sole remedy in that case being a rescission of the contract.

DE COURCY, J. The plaintiff Joseph Lewenberg (hereinafter called the plaintiff) and the defendants entered into a written

agreement dated April 3, 1914, for the purchase and sale of a parcel of land in Brookline. It was provided therein that the premises should be conveyed "by a good and sufficient deed, conveying a good title free from all incumbrances, except the taxes for the current year." On April 28, 1914, the defendants executed to the plaintiff Ruth Lewenberg a quitclaim deed of the premises, with the usual covenant against incumbrances made or suffered by the grantors, and with a limited warranty. Shortly afterwards, the plaintiff gave certain mortgages on the real estate in question, and proceeded to erect a building on a portion of it. In June or July, he discovered that a watercourse ran across the rear of two of the lots embraced in the parcel, and entirely across one of them. According to the findings of the trial judge,\* there was no intentional fraud or concealment on the part of the defendants in failing to inform the plaintiff of its existence; and the quitclaim deed given by them was what they intended to give.

The plaintiff seeks by this bill in equity to have the deed reformed so that it shall contain a covenant against incumbrances; or, with the same object in view, to have the written agreement specifically performed. By the terms of the report, if on the facts found by the trial judge "the plaintiffs are entitled to relief under their bill of complaint, a decree is to be entered in their favor, either for the specific performance of the written agreement of April 3 or for such reformation of the deed of April 28 as will make it conform to said agreement; otherwise, the bill is to be dismissed."

The only claim of a defect in the title made by the plaintiff is predicated upon the watercourse. We do not find it necessary to determine whether the existence of this natural watercourse, and the alleged rights therein of the town of Brookline under St. 1887, c. 99,† constitute an "incumbrance" within the meaning of the written agreement of April 3. One of the provisions of that agreement was as follows: "If the parties of the first part shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded,

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\* *Morton, J.*

† Entitled "An Act to authorize the town of Brookline to provide for surface drainage and to improve the brooks and natural streams within the limits of said town."

and all other obligations of either party hereunto shall cease, but the acceptance of a deed and possession by the party of the second part shall be deemed to be a full performance and discharge hereof." Even assuming that the watercourse creates an "incumbrance" within the meaning of the agreement, the plaintiff is not entitled to a deed containing a covenant against it. It was in existence when the agreement was executed, and could not be removed from the premises by the defendants. They did not bind themselves to convey the property if found to be subject to a permanent incumbrance, and thereby to expose themselves to litigation and liability. On the contrary, they contemplated the contingency of being "unable to give title or to make conveyance" and, in that event, stipulated that the parties should be put *in statu quo*, and the agreement terminated, and that all obligations of either party thereto should cease. It may be that the plaintiff, by taking possession under his deed and making improvements, practically is precluded from availing himself of this provision. But the defendants, who have acted in good faith, cannot for that reason be subjected to a liability against which they expressly guarded in the agreement freely made by the parties.

In accordance with the terms of the report, the entry must be  
*Bill dismissed.*

*H. T. Richardson*, for the plaintiffs.

*B. A. Brickley*, for the defendants.

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AMERICAN MUTUAL LIABILITY INSURANCE COMPANY vs.  
COMMONWEALTH.

Suffolk. March 30, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Tax*, Excise on domestic insurance company. *Insurance*, Excise on domestic company.

Under St. 1909, c. 490, Part III, §§ 28, 33, the excise "on all premiums received for insurance" by a domestic (not life) insurance company is imposed on the gross amount of the premiums and not merely on their net amount after deducting such dividends, if any, as the board of directors of a mutual company may decide to repay to its policy-holders.

DE COURCY, J. The petitioner, a domestic mutual insurance company, seeks the abatement of a portion of an excise tax paid by it under protest on November 1, 1914.\*

The company was incorporated by St. 1887, c. 130; and by the provisions of § 2 was directed to "charge and collect upon its policies a full mutual premium in cash or notes absolutely payable." On October 27, 1914, it made a return to the tax commissioner for the year ending September 30, 1914, in accordance with St. 1909, c. 490, Part III, § 34, stating the premiums received, the return premiums on cancelled policies and the amount of the premiums received and taxable in other States. From this return the tax commissioner, in accordance with § 35 of that statute, assessed upon the petitioner an excise tax of one per cent on the balance of the premiums after making the deductions. During each month of the year the directors of the company declared, and the company returned to its policy-holders whose policies expired during those months, a dividend of thirty per cent. The petitioner seeks to recover one per cent of the amount which it returned to its policy-holders as dividends, but which was included in the amount on which the tax commissioner based his computation of the tax.

The statutory provisions under which the tax was assessed are as follows:

"Section 28. A domestic fire, marine, fire and marine, real estate title and other insurance company, except life insurance companies and except companies liable to taxation on their corporate franchise under the provisions of this part, shall annually pay a tax or excise of one per cent on all premiums received for insurance during the preceding year whether in cash or in notes absolutely payable, and one per cent on all assessments made by such company upon policy-holders; but premiums received in other States where they are subject to a like tax shall not be so assessed."

"Section 33. In determining the amount of the tax payable under the five preceding sections, all unused balances on notes taken for premiums on open policies, all sums paid for return premiums on cancelled policies, and all sums actually paid either to

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\* The petition was filed in the Supreme Judicial Court on May 4, 1915, and was reserved by *Carroll, J.*, for determination by the full court.

other domestic insurance companies or to the agents of foreign companies for reinsurance on risks, the premiums on which, but for such reinsurance, would be liable to taxation, shall, in each case, be deducted from the full amount of premiums and assessments; but no deduction shall be allowed of sums paid for reinsurance effected otherwise than by licensed resident agents nor shall dividends in scrip or otherwise in stock, mutual or mixed companies be considered as return premiums.

"Section 34. Every company liable to taxation under the provisions of sections twenty-eight and thirty-two shall annually, between the first and fifteenth days of October, make a return to the tax commissioner, signed and sworn to by its secretary or other officer having knowledge of the facts, stating the amount insured by said company, and the premiums received and assessments collected by it during the year ending on the preceding thirtieth day of September. . . . Such returns shall state the whole amount of premiums charged by or in behalf of said company, association and partnership either in cash or in notes absolutely payable, the amount claimed as a deduction therefrom under any of the provisions of this part, and also the classes of deductions and the amount of each class."

The language of § 28, "a tax or excise . . . on all premiums received," naturally is to be interpreted as meaning gross premiums, and not merely the net amount retained by the company after deducting such dividends, if any, as the board of directors may decide to repay to the policy-holders. And any doubt as to the correctness of this interpretation would be removed by the clause in § 33 which expressly provides, ". . . nor shall dividends in scrip or otherwise in stock, mutual or mixed companies be considered as return premiums." Indeed, it is difficult to see how the other provisions of the statute could be carried out in practice if the contention of the petitioner were adopted. The return is to be made by the company between October 1 and October 15, and must state "the premiums received and assessments collected by it during the year ending on the preceding thirtieth day of September." The amount of the tax must be determined mainly from this return. Many policies written during the year preceding September 30 are certain to expire subsequent to that date; and the dividends payable on those policies cannot



be ascertained until long after the times fixed by the statute for the determination and the payment of the tax.

An examination of the history of the statute confirms the contention of the Commonwealth that dividends should not be deducted in determining the basis of the tax. Under the original statute imposing a tax of this character upon insurance companies, no deduction whatever was allowed from the full amount of all gross premiums received. St. 1862, c. 224, §§ 1, 6, 9. When, subsequently, provision was made for certain deductions, — such as sums paid for return premiums on cancelled policies and sums actually paid to other insurance companies for reinsurance on risks — it was expressly provided, “nothing in this section shall be so construed as to admit of dividends in scrip or otherwise, in stock, mutual or mixed companies, to be called return premiums.” St. 1868, c. 165, § 1. No substantial change in that provision has since been made. See St. 1873, c. 141; St. 1909, c. 490, Part III, § 28.

Cases like *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. Rep. 199, *Herold v. Mutual Benefit Life Ins. Co.* 201 Fed. Rep. 918, *Connecticut General Life Ins. Co. v. Eaton*, 218 Fed. Rep. 188, and *Connecticut Mutual Life Ins. Co. v. Eaton*, 218 Fed. Rep. 206, cited by the petitioner, involve the construction of an act of Congress, (36 U. S. Sts. at Large, c. 6, § 38,) imposing a tax upon “the entire net income” received during the year by the insurance company.

Manifestly the amendment of § 33 by St. 1916, c. 227 (approved May 17, 1916) is not applicable to the present case.

The entry must be

*Petition dismissed.*

The case was submitted on briefs.

*E. C. Stone*, for the petitioner.

*H. C. Atwill*, Attorney General, & *W. H. Hitchcock*, Assistant Attorney General, for the Commonwealth.

JOANNA M. HAYES, administratrix, vs. BOSTON ELEVATED  
RAILWAY COMPANY.

Suffolk. March 20, 1916. — May 16, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Negligence*, Street railway, Causing death, Use of highway. *Practice, Civil*,  
Judge's charge: misleading illustration.

Where a man in the evening on leaving a sidewalk to cross a street fifty feet wide with two car tracks in the middle of it was seen to be looking in the direction of a plainly visible street railway car approaching on the farther track from two hundred and fifty to three hundred feet away and to be walking slowly with a hand in his pocket and his head down and was not seen to look in the direction of the car while crossing the street, and when he was on the nearer track and the car approaching on the farther track was distant somewhat more than thirty feet he was seen to take a step or two on the farther track where he was struck by the car and was knocked down and dragged about twenty-seven feet, in an action under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1, for causing his death, it was *held*, that there was no evidence that the decedent at the time of the injury that caused his death was actively in the exercise of due care as required by the statute, and judgment was ordered for the defendant.

Where, at the trial of an action against a street railway corporation under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1, for negligently causing the death of a traveller on the highway, the presiding judge in his charge described to the jury the method of arriving at the penalty to be imposed on a defendant who was found guilty upon an indictment for manslaughter, it was *said*, that it was not necessary to decide whether the use of this illustration by the judge was as matter of law so prejudicial to a fair trial of the issues as to require a setting aside of the verdict and the granting of a new trial; because in the present case judgment was ordered for the defendant on another ground and because it was not reasonable to expect that a like illustration would be used in other cases.

PIERCE, J. This is an action of tort for the death of the plaintiff's intestate, not a passenger, alleged to have been caused by the negligence of the defendant. In order to recover, there must be affirmative proof that the decedent was actually looking out for his personal safety at the time he was injured, and so was in the exercise of due care within the meaning of these words in St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, § 1. *McCue v. Boston Elevated Railway*, 221 Mass. 432. *Gaffney v. Bay State Street Railway*, 221 Mass. 457. *Raymond v. Worcester Consolidated Street Railway*, 222 Mass. 396.

Upon the issue of the decedent's due care, the direct and inferential evidence warranted a finding by the jury of these facts: The accident happened on Broadway, South Boston, at or near the easterly crossing of A Street on February 13, 1914, at 8:15 P. M. Broadway is about fifty feet wide and runs nearly east and west, having two tracks in the middle; A Street is about thirty feet wide and crosses Broadway at right angles; there was a white post on the southerly side of Broadway about twenty-five feet east of A Street; there was an electric arc light on the southeast corner of Broadway and A Street which was lighted, and there were stores on both sides of Broadway which were lighted; the plaintiff's intestate was struck by a car which was coming from Boston and going easterly toward City Point on the southerly outbound track; the intestate, immediately before the accident, started at the easterly crosswalk at A Street on the northerly side of Broadway to cross to the southerly side of Broadway; as he left the sidewalk, he was observed by a number of witnesses to be looking in the direction of a plainly visible approaching car, two hundred and fifty to three hundred feet distant; he was walking slowly with a hand in his pocket and head down; no witness testified that the intestate looked in the direction of the car while crossing the street, and a witness for the defendant testified that he did not look; when the intestate was upon the inbound track, the car approaching on the outbound track was distant somewhat more than the width, thirty feet, of A Street; he took a step or two over the outbound track and was struck, knocked down and dragged under the car for about twenty-seven feet.

The undisputed facts leave the question of the decedent's due care after he saw the car from the sidewalk a matter of pure conjecture, and fail to prove that he was actually looking out for his own safety. This is fatal to a recovery on any count of the declaration. See *Callaghan v. Boston Elevated Railway*, 200 Mass. 450; *Haynes v. Boston Elevated Railway*, 204 Mass. 249.

There was evidence of negligence on the part of the defendant in that its motorman permitted the car to coast across A Street under the then existing conditions.

We need not decide whether that part of the charge\* which described the method of arriving at the penalty to be imposed upon

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\* Of *White*, J., who presided at the trial.

a defendant found guilty upon a criminal prosecution for manslaughter, was, as a matter of law, so prejudicial to a fair trial of the issues as to require a setting aside of the verdict and the granting of a new trial, as it is not reasonable to expect that a like illustration will be again used.

The request numbered two, that "There is no evidence which would warrant the jury in finding that the plaintiff was in the exercise of due care" should have been given. The exceptions must be sustained and judgment entered for the defendant under St. 1909, c. 236.

*So ordered.*

*H. S. MacPherson*, for the defendant.

*C. W. Rowley*, for the plaintiff.

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CHARLES NESZERY vs. DANIEL B. BEARD.

Suffolk. March 30, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Trustee Process. Attachment, Bond to dissolve.*

Where an attachment by trustee process has been dissolved by the giving of a bond with sufficient sureties approved by a master in chancery after notice and hearing given and conducted in pursuance of the requirements of R. L. c. 167, §§ 116, 117, the creditor of the trustee who was the defendant in the action in which the attachment by trustee process was made immediately may sue his debtor who was summoned as trustee without any further demand after the dissolution of the attachment.

There is nothing in the Revised Laws nor elsewhere which requires that one who has been summoned as trustee by trustee process should receive any notice of an application by the defendant to a magistrate to dissolve the attachment.

CONTRACT under R. L. c. 165, § 49, to recover \$267.09, collected for the plaintiff by the defendant as an attorney at law, with four times the lawful interest thereon from April 1, 1914, when the money was in the hands of the defendant and was demanded by the plaintiff. Writ in the Municipal Court of the City of Boston dated May 2, 1914.

On removal to the Superior Court the case was tried before

*Bell, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make the ruling quoted in the opinion. The judge refused to make this ruling.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

*D. B. Beard*, for the defendant.

*C. W. Rowley*, for the plaintiff.

*PIERCE, J.* On April 29, 1914, by writ of even date issued out of the Municipal Court of the City of Boston and returnable to that court on May 9, 1914, the defendant in the case at bar was summoned to answer as trustee of Charles Neszery, the defendant in that writ and the plaintiff in the pending action.

On May 2, 1914, the attachment by trustee process was dissolved by the giving of a bond with sufficient sureties, approved by a master in chancery, after notice and hearing given and conducted in pursuance of the requirements of R. L. c. 167, §§ 116, 117. The bond, after approval, on the same day was filed with the clerk of the Municipal Court of the City of Boston, to which court the writ was made returnable.

On May 2, 1914, after the dissolution of the attachment by trustee process and after the filing of the bond in the clerk's office of the Municipal Court of the City of Boston, the plaintiff sued out his writ in the instant action.

"At the close of the trial the defendant, Beard, requested the court to rule that on all the evidence the defendant Beard was entitled to have the court order a verdict for him upon the sole ground that the suit was prematurely brought." The contention of the defendant is that he was entitled to a notice of the giving the bond and thereafter to a demand for payment. The Revised Laws contain neither a direction nor suggestion that the trustee named in the writ should receive notice of an application to a magistrate to dissolve an attachment, and it is impossible to see what interest an alleged trustee could have in the outcome of such a hearing. *Kellogg v. Waite*, 99 Mass. 501, 502.

Moreover, there is nothing in the statutes or in the general rule of law to prevent a creditor from bringing an action against a debtor who has been summoned merely as a trustee of the creditor in the same domestic forum. *Winthrop v. Carlton*, 8 Mass.

456. *Whipple v. Robbins*, 97 Mass. 107. *American Bank v. Rollins*, 99 Mass. 313. *Kellogg v. Waite*, *supra*. *Craig Silver Co. v. Smith*, 163 Mass. 262, 266.

The pendency of an action wherein the trustee is summoned before the suing out of the writ in which the trustee is the principal defendant, when seasonably pleaded, operates at most as a stay, and not as a bar to the prosecution of the action. *Cushing on Trustee Process*, § 278. *Winthrop v. Carlton*, *supra*. *Kellogg v. Waite*, *supra*. Indeed, the defence that a defendant has been summoned as trustee in a foreign tribunal is only available so long as the defendant is subject to possible double liability. It is a sufficient answer if at the date of the trial the defendant is no longer under any peril because of the trustee process. *Craig Silver Co. v. Smith*, *supra*. The defendant admits that the plaintiff's right of action had accrued before he, the defendant, was summoned as trustee, and before the institution of this action.

No further demand to charge the defendant was necessary after the dissolution of the attachment.

*Exceptions overruled.*

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CHARLES H. TAYLOR, JR., vs. BOSTON, CAPE COD AND NEW YORK CANAL COMPANY.

Barnstable. March 31, 1916. — May 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Fisheries. Oysters. Cape Cod Canal.*

Under St. 1899, c. 448, § 16, providing for the recovery of damages to "any fishery, including oyster fisheries," caused "by the deposit of excavated material, or in any other way" by the construction of the Cape Cod Canal, the licensee of oyster beds in Buzzards Bay may recover damages for loss suffered by reason of the pollution of the water over the flats by a sediment of sand and decayed organic matter stirred up by the excavations which caused the oysters to sicken and perish.

PETITION, filed on April 20, 1911, under St. 1899, c. 448, § 16, for the assessment of damages to the petitioner's oyster beds in Buzzards Bay alleged to have been caused by the construction of the Cape Cod Canal.

In the Superior Court the case was tried before *Jenney, J.* At

the close of the evidence, which is described in the opinion, the respondent asked the judge to rule that on all the evidence the jury should find for the respondent and to give this and certain other instructions to the jury. The judge refused to give this and other instructions requested and submitted the case to the jury with instructions, to a part of which the respondent excepted.

The jury returned a verdict for the petitioner in the sum of \$3,516.39; and the respondent alleged exceptions.

*R. G. Dodge*, (*H. S. Davis* with him,) for the respondent.

*J. W. Lund*, (*R. J. Cram* with him,) for the petitioner.

BRALEY, J. The petitioner before and after the enactment of St. 1899, c. 448, incorporating the respondent company had been lawfully granted several licenses "to plant, grow and dig oysters at all times in the year in and upon the flats in the tide waters of Buzzards Bay" within the limits of the town of Bourne. Pub. Sts. c. 91, §§ 97, 98. St. 1884, c. 284. St. 1885, c. 220. St. 1886, c. 299. R. L. c. 91, §§ 104, 105, 106. And through successful propagation and cultivation he had become the owner of a large quantity of merchantable oysters embedded within the area covered by the grants.

Until the licenses had been terminated the oysters remained his exclusive property, and he could have maintained an action of tort for their removal or destruction by private persons. *Keene v. Gifford*, 158 Mass. 120, 123. *Griffith v. Savary*, 181 Mass. 227. The St. of 1899, c. 448, § 16, recognizes and protects this class of property from injury or confiscation during the work of construction by providing that, "In case of any injury to any fishery, including oyster fisheries, caused by said canal company by the deposit of excavated material, or in any other way, the canal company shall pay to the owner or licensee of said fishery, or to the towns of Sandwich or Bourne in case the fisheries destroyed or damaged are public fisheries, such damages as shall upon the application of either party be estimated by the commissioners on inland fisheries and game, in a manner similar, so far as may be, to that provided in laying out highways, and with a right of appeal to a jury by proceedings similar to those provided for in section five of this act."

The evidence was conflicting. But the jury could find upon the evidence introduced by the petitioner, that in excavating for

the canal which included the "approach channels," a sediment consisting of sand and decayed organic matter from the excavations so roiled and polluted the water flowing over the flats that the oysters, being thereby deprived of a full supply of food, sickened and perished. St. 1899, c. 448, § 3. It is the respondent's contention that the damages suffered are too remote and indirect to be recoverable, and that injury to particular oysters as distinguished from impairment in the future of the value of the licenses, is not within the purview of the statute.

If this construction is adopted the words "oyster fisheries" and "licensee" become meaningless, for the Pub. Sts. c. 91, §§ 97, 98, in force when the original licenses, afterwards renewed, were issued expressly provides that no license shall be granted covering any portion of tide water flats where a natural oyster bed exists, and it is to be assumed that the selectmen complied with the requirements of the statute. The fishery moreover is created by statute, and when the St. of 1899, c. 448, was enacted the Legislature must be presumed to have intended by the words "oyster fisheries" and "licensee" the statutory fishery which the petitioner has been licensed to maintain. *Devey's Case*, 223 Mass. 270, and cases cited.

While it is true that the destruction of the shell fish was not caused by the "deposit of excavated material" dumped upon the flats, the context, "or in any other way," leaves no doubt that, even if the portions occupied by the petitioner have not been taken, compensation is provided if the injury proved is found attributable to the authorized construction and completion of the canal as a navigable waterway. *Bent v. Emery*, 173 Mass. 495. *Wellington v. Cambridge*, 220 Mass. 312, 316, 317, and cases cited. St. 1899, c. 448, § 3. The petitioner not having sought or been awarded damages for any diminution in the future of the value of the granted flats for cultivation as an oyster fishery, and the measure of recovery having been strictly limited to the oysters in the soil and the oyster seed attached thereto, as stated by the presiding judge in his instructions to the jury, we find no error of law in his refusal of the defendant's requests or in the instructions given in so far as the questions raised by the exceptions have been argued.

*Exceptions overruled.*



WILLIAM C. DOHERTY & another vs. PHOENIX INSURANCE COMPANY.

SAME vs. CONNECTICUT FIRE INSURANCE COMPANY.

SAME vs. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

SAME vs. SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

SAME vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

SAME vs. SUN INSURANCE OFFICE.

SAME vs. NEW HAMPSHIRE FIRE INSURANCE COMPANY.

SAME vs. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED.

SAME vs. PHOENIX ASSURANCE COMPANY, LIMITED.

SAME vs. FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY.

SAME vs. HARTFORD FIRE INSURANCE COMPANY.

SAME vs. NORWICH UNION FIRE INSURANCE COMPANY, LIMITED.

SAME vs. MASSACHUSETTS FIRE AND MARINE INSURANCE COMPANY.

Middlesex. March 27, 1916. — May 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Practice, Civil*, Exceptions, Cases tried together. *Evidence*, Presumptions and burden of proof. *Insurance, Fire. Reference and Referee. Arbitrament and Award.*

When a bill of exceptions is presented to a trial judge for allowance, it is his duty to allow or to disallow it, and in disallowing it he may, if he deems it necessary, state his reasons in the certificate of disallowance. In the present case the judge allowed a bill of exceptions and in his certificate of allowance described a motion to dismiss the exceptions on the ground that they were not filed seasonably, on which he had not acted, and it was *said*, that a motion could have been made in this court to dismiss the exceptions for want of jurisdiction but that the mo-

tion to dismiss the exceptions filed in the trial court properly could not be considered by this court because it never had been passed upon by the trial judge. Where a number of cases, brought by the same plaintiff against different defendants on separate fire insurance policies for a loss arising from the destruction of the same property by the same fire, were tried together and a verdict was returned for the plaintiff in each of the cases, it was *held*, that a single bill of exceptions presented jointly by all the defendants properly might be allowed.

In an action on a fire insurance policy the jury found, in answer to a special question submitted to them, that the plaintiff did not set the fire nor cause it to be set, and the defendant excepted to the exclusion of certain evidence offered by it on this issue but failed to state in its bill of exceptions the evidence which, it contended, tended to show that the plaintiff set the fire, giving as a reason for such failure, that as the issue was left to the jury it was to be presumed that there was some evidence on both sides. *Held*, that, in the absence of a statement of such evidence, the relevancy of the evidence excluded could not be determined, and that the exception must be overruled.

It is a general rule that referees or arbitrators clothed with the power of deciding controverted questions between party and party must be disinterested and impartial unless by the mutual understanding of the parties they or some of them purposely are selected as partisans.

In this Commonwealth, in an action upon an award of referees, the award can be impeached on the ground of alleged misconduct of the referees without resorting to a suit in equity to have the award set aside.

Where the powers of referees are unrestricted by the terms of the reference, their decisions on all necessary questions of law and their findings of fact involved in the determination of the controversy submitted to them are final. If at the hearings before them they make errors as to the admission of evidence or in the scope allowed to counsel in argument, such errors are not reviewable.

In an action on a fire insurance policy where the defendant sought to impeach the finding of the referees as to the amount of the loss on the ground of corruption of the referees by the plaintiff, it appeared that the plaintiff voluntarily paid for "lunches" furnished to the referees and offered them cigars, that the first luncheon was furnished with the knowledge of the defendant's counsel who made no objection to proceeding before the referees, and that a second luncheon was furnished at which cigars were supplied, of which the defendant's counsel did not know until the day after the award had been published. There was evidence that there was no concealment by the plaintiff on either occasion, that he did not act corruptly or with the intention of inducing the referees to decide in his favor and that the referees accepted the hospitality only as a courtesy, not deeming the occasion of any importance. *Held*, that the jury were warranted in finding that the referees had not been influenced improperly and had acted throughout the proceedings in good faith.

In the same case it was contended by the defendant that the award was so grossly in excess of the actual amount of the loss as to show that the referees must have been biased or have acted corruptly, and a large amount of evidence as to the value of the insured property at the time of the fire was introduced by the parties. Certain evidence offered by the defendant on this issue was *held* to have been excluded properly by the judge in the exercise of a sound discretion on the ground that it was too remote, speculative, collateral and immaterial and that it tended to confuse the jury and to divert their attention from the material issues on which they were to pass.

In the case above described it did not appear that a statement of all the evidence introduced by both parties before the referees was offered at the trial, and it was held, that the portion of such evidence printed in the record manifestly was insufficient to enable the jury to determine whether the referees committed such gross mistakes of overvaluation as to show misconduct.

BRALEY, J. The plaintiffs seek to recover in thirteen separate actions for loss of property covered by policies of fire insurance issued by the respective defendants. By order of the trial judge\* the cases were tried together; and, a verdict having been returned for the plaintiffs in each case, the defendants presented and the judge allowed one bill of exceptions, stating in his certificate that the plaintiffs contended that each defendant should have presented a separate bill of exceptions, and that, as this had not been done, the exceptions were not filed seasonably and should be disallowed.

It was the duty of the judge either to allow or disallow the exceptions, giving, if he deemed it necessary, his reasons in the certificate, and, if the exceptions were allowed, the plaintiffs could move in this court that they be dismissed for want of jurisdiction. *Conway v. Callahan*, 121 Mass. 165. *Cooney v. Burt*, 123 Mass. 579. *Hale v. Rice*, 124 Mass. 292. *Browne v. Hale*, 127 Mass. 158. R. L. c. 173, § 106.

The motion to dismiss the exceptions on this ground filed in the trial court, although fully set forth in the certificate, has never been passed upon and cannot be considered. But, inasmuch as the question whether the exceptions were properly allowed is presented by the certificate and has been argued by counsel, it should be decided.

The actions, although brought for different causes, are for the recovery of one loss common to all the policies, and, with the exception that the verdicts, judgments and rescripts must be separate, a joint trial undoubtedly tended to benefit the parties, saving costs and expenses and preventing delay as well as tending to lessen the possibility of mistrials. *Lumiansky v. Tessier*, 213 Mass. 182, 188.

If these considerations were sufficient to justify the order of a joint trial before a jury, we perceive no sufficient reason why questions of law cannot be presented to this court by a single bill of

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\* *Keating, J.*

exceptions wherein all parties aggrieved are joined. Indeed this practice has often been recognized and sanctioned without comment. *Locke v. Royal Ins. Co. Ltd.* 220 Mass. 202. *Whitcomb v. Boston Dairy Co.* 218 Mass. 24. *Christiansen v. Lannin*, 215 Mass. 322. *Rockwell v. Hamburg-Bremen Fire Ins. Co.* 212 Mass. 318. *Greenough v. Phoenix Ins. Co.* 206 Mass. 247. *Parker v. Middlesex Mutual Assurance Co.* 179 Mass. 528.

The exceptions being properly here, we come to the questions raised by the record.

While conceding that the policies were in force at the date of the fire and that proper proofs of loss had been furnished, and that referees to ascertain the amount of loss had been chosen as provided in each policy and awards had been made, the defendants, having declined to accept the awards, rested their defence on the ground stated in the following issues: "Whether or not the plaintiff [William C. Doherty] set the fire in question or caused it to be set;" "Whether or not the award of referees . . . was valid," and "Whether or not a certain policy which had been issued by the London Assurance Corporation, and which purported to cover the plans, patterns, drawings and blue prints for \$1,500 and the machines and parts of machinery for \$1,000, had been legally cancelled before the fire." And, these issues properly phrased having been submitted to the jury, they answered the first in the negative, and the second and third in the affirmative.

It will be convenient to dispose of the first and third issues before considering the second issue around which the principal controversy centres.

The brief of the counsel for the defendants states: That "the evidence which tended to show that the plaintiff, William C. Doherty, set the fire in question is not set forth in the bill, because it seemed to us to have no bearing on the only exceptions which we took relative to the matter, and because, from the fact that the question was left to the jury, it is to be presumed that there was evidence which justified it."

But this assumption of evidence of wrongful conduct cannot be made; and in the absence of such evidence as a foundation, the relevancy of the offer of proof which was excluded and is the sole exception under this issue, cannot be ascertained and determined. *Barron v. International Trust Co.* 184 Mass. 440. *Paquette v. Pru-*

*dential Ins. Co.* 193 Mass. 215, 222. *Whittemore v. New York, New Haven, & Hartford Railroad*, 191 Mass. 392.

The judge also rightly refused to rule, that there was no evidence from which the jury could find that the policy issued on the property by the London Assurance Corporation had been cancelled, and that, if the policies issued by the defendants were in force, then the policy of that company was also in full force and effect.

It was for the jury, under suitable instructions which were given, to determine from the letter of the company's agent to the plaintiffs demanding at the request of the company the policy for cancellation and from what occurred at a subsequent interview between him and one of the plaintiffs, whether there had been a mutual agreement and understanding that the policy had been terminated. *Smith v. Scottish Union & National Ins. Co.* 200 Mass. 50, 57. *Bennett v. City Ins. Co.* 115 Mass. 241, 243. *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. 433.

The declarations having alleged, that in accordance with the requirements of the policies the amount of loss had been fixed by referees who have made their award in writing, and that upon making the award each of the defendants became bound to pay its proportionate part of the loss, the plaintiffs were required to offer evidence of a valid award as a condition precedent to recovery. St. 1907, c. 576, § 60, as amended by St. 1911, c. 406. *Union Institution for Savings v. Phoenix Ins. Co.* 196 Mass. 230, 234, 235. *Hanley v. Aetna Ins. Co.* 215 Mass. 425, 431. *Second Society of Universalists v. Royal Ins. Co. Ltd.* 221 Mass. 518.

It is a general rule, even if the letter, properly admitted in evidence, of the plaintiffs' counsel replying to a letter from the defendants' counsel previously introduced tends to show a contrary practice, that referees or arbitrators clothed with authority and the power of deciding controverted questions between party and party, should be disinterested and impartial, unless with the mutual understanding of the parties they are purposely selected as partisans. *Hills v. Home Ins. Co.* 129 Mass. 345. *Hanley v. Aetna Ins. Co.* 215 Mass. 425, 430. *Morville v. American Tract Society*, 123 Mass. 129, 140. *Williams v. Chicago, Santa Fe & California Railway*, 112 Mo. 463, 486, 489. And the defendants under our law can impeach an award on the ground that the ref-

erees were guilty of misconduct, instead of resorting to a bill in equity to have it set aside. *Bean v. Farnum*, 6 Pick. 269, 273.

The jury would have been warranted in finding that the plaintiffs voluntarily paid for "lunches" furnished to the referees and offered them cigars, and that at the hearings testimony as to the amount of premiums paid for insurance was admitted in evidence, and the plaintiffs' counsel was permitted to argue that the defendants' agent by whom the insurance was solicited knew the cost to the plaintiffs of the insured property and that, a large amount in premiums having been paid, the defendants were guilty of fraud if they declined payment of the loss suffered. But the error, if error there was, in the admission of evidence and in the scope allowed counsel in argument, is not reviewable. The referees were unhampered by any restrictions or conditions \* and their decisions on all necessary questions of law, and their findings of fact involved in the question or controversy submitted, are final. *Bigelow v. Newell*, 10 Pick. 348. *Boston Water Power Co. v. Gray*, 6 Met. 131. *Smith v. Boston & Maine Railroad*, 16 Gray, 521. *Rundell v. La Fleur*, 6 Allen, 480. *Mickles v. Thayer*, 14 Allen, 114. *Gardner v. Boston*, 120 Mass. 266, 267. *Goodman v. Sayers*, 2 Jac. & W. 249, 259.

It is also settled that where the defeated party is aware of the existence of conditions which may influence the judgment of an arbitrator or referee, or previous to the hearing has sufficient notice of the partiality of one or more of the referees to put him upon inquiry but remains silent, he cannot afterwards object to the award or report on the ground of partiality. *Fox v. Hazelton*, 10 Pick. 275, 277. *New England Trust Co. v. Abbott*, 162 Mass. 148, 153. *Moseley v. Simpson*, L. R. 16 Eq. 226.

The furnishing of the first luncheon was with the knowledge of the defendants' counsel who made no objection to proceeding before the referees, but until the day after the award had been published the counsel did not know of the second luncheon at which cigars also were supplied.

The entertainment of an arbitrator or referee by one of the interested parties ordinarily is censurable. It may be so flagrant in

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\* The referees were chosen in the manner required by the arbitration clause contained in each of the policies, all of which were in the Massachusetts standard form prescribed by St. 1907, c. 576, § 60.

character as to justify and require the setting aside of the award. See *Robinson v. Shanks*, 118 Ind. 125. But the jury to whom in the case at bar this question was rightly left could find that there was no concealment by the plaintiffs on either occasion; that they did not act corruptly or with the intention of inducing the referees to decide in their favor, and that the referees accepted the hospitality only as a courtesy, not deeming the occasion, as one of them a witness for the defendants properly was permitted to state in cross-examination, of any importance, and that the referees had not been influenced thereby but acted throughout the proceedings in good faith. *Brown v. Bellows*, 4 Pick. 179, 192. *Strong v. Strong*, 9 Cush. 560. *Farrell v. German American Ins. Co.* 175 Mass. 340, 347. *Morville v. American Tract Society*, 123 Mass. 129, 139, 140, 141. *Liverpool & London & Globe Ins. Co. v. Goehring*, 99 Penn. St. 13. *Crossley v. Clay*, 5 C. B. 581. *In re Hopper*, L. R. 2 Q. B. 367, 374.

The policies having insured the patterns, drawings, models, jigs and blue prints and printed matter pertaining to the manufacture of planers and other machinery and also all the fixed and movable machinery and machines with extra and spare parts of the same and the shafting, belting, pulleys and hangers which were contained in the plaintiffs' three story frame building, basement and additions, and the defendants having pleaded that the award was so grossly in excess of the actual amount of the loss as to show that the referees must have been biased or have acted corruptly, a large amount of evidence as to the value of the property at the time of the fire was introduced by the parties. But offers of proof by the defendants, that the type of planers to be manufactured by the plaintiffs and the drawings and patterns therefor had been greatly diminished in value because other planers of alleged improved types had been put upon the market, and of the cost to the plaintiffs of manufacturing the planers and the time required and the number of men who necessarily must be employed, and the percentage of planers made by other manufacturers, and the place in which the plaintiffs' drawings and models were stored, or whether they could have been put in a safe, or why if of great value the plaintiffs did not keep them in a safe place, were so remote, speculative, collateral and immaterial as bearing on the question of the value of the insured property as well as tend-

ing to confuse the jury and direct their attention from the material issues upon which they were to pass, that their exclusion was within the sound discretion of the judge. *Abbott v. Shepard*, 142 Mass. 17, 21. *Anthony v. New York, Providence, & Boston Railroad*, 162 Mass. 60. *Dolan v. Boot Cotton Mills*, 185 Mass. 576, 579.

The exclusion, in the cross-examination of a witness called by the plaintiffs, of a question calling for his recollection of what a witness had said before the referees and of a question to one of the plaintiffs whether he testified before the referees substantially as he had at the trial and also "something more than at the trial" and of a copy of the brief for the defendants submitted to the referees, does not appear to have prejudiced the substantive rights of the defendants. *Worrell v. Baldwin Chain & Manuf. Co.* 222 Mass. 355. St. 1913, c. 716, § 1.

It furthermore does not appear that all the evidence introduced by both parties before the referees was offered at the trial, and a portion is manifestly insufficient to enable a jury to determine whether the referees committed such gross mistakes of overvaluation as to show misconduct. *Brown v. Bellows*, 4 Pick. 179, 192. *Bell v. Price*, 1 Zab. 32, 36, 37, 38. The jury on the evidence submitted to them were to decide under suitable instructions whether the total amount awarded was so grossly in excess and out of all proportion to the actual loss sustained, as to show, when viewed in connection with the other allegations of misconduct, that there was fraud or partiality on the part of the referees.

It being plain for reasons previously stated that on its face the award as matter of law was not invalid on either ground alleged and that it could only be impeached by extrinsic evidence, the request that a verdict for the defendants be ordered could not have been given. It is sufficient to say that, the plaintiffs not having contended that the demand by the defendants for resubmission had been waived, the requests relating thereto were immaterial, while full and accurate instructions were given that the plaintiffs could not recover unless the award was found to be valid. The judge was not required to give the requests based on particular portions of the evidence. *Moseley v. Washburn*, 167 Mass. 345, 362. And the plaintiffs' requests to the giving of which the defendants excepted were correct and appropriate. *Washington Mills Emery Manuf. Co. v. Weymouth & Braintree Mutual Fire Ins.*



Co. 135 Mass. 503. *Farrell v. German American Ins. Co.* 175 Mass. 340. *Hanley v. Aetna Ins. Co.* 215 Mass. 425.

The defendants also excepted to the instructions. It was unnecessary for the judge to recite the evidence. The jury were told, "If you find that in the making of this award there was fraud on the part of one or more referees, or bias or prejudice, or that there was misconduct on the part of Doherty or someone else that influenced one or more of the referees in the making of the award, then the award would not be valid. But, if you find that these referees acted honestly and with a desire to arrive at a just and correct result, then the award would be valid. That is to say, gentlemen, if you find that the referees were free from bias, prejudice or fraud, in the making of the award, and that there was no misconduct on the part of the plaintiff or anybody else that influenced them in the making of the award, then you will be justified in finding that the award was valid."

"One of the grounds on which the defendants base their claims is that, as they allege, the award was grossly excessive. The plaintiffs deny that the award was excessive. The plaintiffs claim that the actual value of the insured property at the time of the fire was in excess of the amount of the award. So it becomes necessary for you to ascertain whether the amount of the award was excessive. "Even if you should find that the award was excessive, that would not be sufficient to warrant you in finding that because of that circumstance alone there was fraud, bias or prejudice on the part of any of the referees. It is only when the award is so grossly and palpably above the actual loss as to afford intrinsic evidence of fraud, bias or prejudice on the part of one or more referees, that you would be warranted in finding that there was fraud, bias or prejudice on the part of one or more referees because the award was in excess of the actual value of the insured property."

The charge is to be considered as a whole; and, without further review, the law by which the jury were to be guided was correctly and clearly stated. *Connors Brothers Co. v. Sullivan*, 220 Mass. 600.

We have considered all the exceptions in so far as argued and finding no reversible error the order must be

*Exceptions overruled.*

*W. L. Came*, for the defendants.

*J. M. Maloney*, (*F. J. Maloney* with him,) for the plaintiffs.

## GEORGE H. ROBINSON vs. JOHN DOE &amp; another.

Suffolk. March 31, 1916. — May 20, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, &amp; CARROLL, JJ.

*Agency, Scope of employment. Negligence, In throwing a brick. Practice, Civil, Judge's charge: comment on absence of witness. Evidence, Admission by failure to call witness, Res gestae.*

If an employee of the proprietors of a circus is engaged with other employees in pulling up the stakes of the circus tent preparatory to taking it down, while a performance is going on inside, and also is attempting to drive away a crowd of boys who have gathered about the tent and who keep coming back as often as they are driven off, and if, while so engaged, he picks up a brick and throws it at the boys and it hits on the head a man who is standing leaning against a fence on a public street fifty or sixty feet away, in an action by this man against the proprietors of the circus for his injuries thus sustained, it can be found that the person who threw the brick was acting within the scope of his employment in doing so, although the particular means he made use of might not have been contemplated by his employers.

In the case above described the judge said in the course of his charge to the jury, "You may infer from the fact of no witness having been called by the defendants touching the relations between the defendants and the man in their employ who is said to have thrown the brick, you may infer if he was called that his testimony would not help the defendants." *Held*, that, while the judge well might have omitted this instruction, it could not be held to have been erroneous.

In the same case it was *held* that evidence that the employee of the defendants in driving the boys away said, "Get to . . . out of here" and made other similar remarks was admissible as evidence of statements accompanying and explaining his acts.

TORT against John Doe and Richard Roe, doing business under the name of the Barnum and Bailey Company, for personal injuries sustained by the plaintiff on June 4, 1910, at about half past nine o'clock in the evening, when the plaintiff was standing on Providence Street in Boston leaning against a fence, from being struck in the head by a brick or stone thrown by a person alleged to be a servant, employee or agent of the defendants acting in the course of his employment. Writ dated June 6, 1910.

In the Superior Court the case was tried before *Irwin, J.* At the close of the evidence, which is described in the opinion, the defendants asked the judge for twenty-one rulings, of which the judge made four and dealt with others as described in the opinion.

The first three requests for rulings were as follows:

"1. On all the evidence the jury must find for the defendants.

"2. It does not appear that the person, if any, who threw the brick or missile which struck the plaintiff was the servant or employee of the defendants.

"3. If the person who threw the brick or missile which struck the plaintiff was a servant or employee of the defendants, it does not appear that the act of throwing the brick was one for which the defendants were liable."

The judge refused to make these and others of the rulings requested, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$200. The defendants alleged exceptions.

The case was submitted on briefs.

*J. B. Studley & M. Wambaugh*, for the defendants.

*H. F. R. Dolan, J. H. Morson & J. S. O'Neill*, for the plaintiff.

CARROLL, J. On the evening of June 4, 1910, the plaintiff while on Providence Street, Boston, was struck by a brick or stone. In a tent on an adjacent lot a circus performance was going on. Workmen were at this time pulling up the stakes, and a man, who appeared to be in charge, was directing them and also attempting to drive away a crowd of boys who had gathered about the circus tent. This man had a stick which he used several times to frighten or to force the boys to leave the premises. On one occasion when they did not move he ran toward them, picked up something and threw it at them. The plaintiff, who was fifty or sixty feet away, was hit by either a brick or stone thrown by this man.

1. There was evidence that the plaintiff was injured by the act of the defendants' servant. The words "Barnum and Bailey's Circus" were on the wagons and the posters, the performance was going on at the time: in addition, a license was granted to "Barnum and Bailey's Greatest Show on Earth" to exhibit on these same grounds from May 30 to June 4. It could be found that the tents and other property were owned by the defendants. *Stewart v. Hugh Nawn Contracting Co.* 223 Mass. 525. *Smith v. Paul Boynton Co.* 176 Mass. 217. *Ingraham v. Chapman*, 177 Mass. 123. *Murphy v. Fred T. Ley & Co. Inc.* 210 Mass. 371. It appeared that the man who threw the missile came from inside the tent.

He wore a khaki shirt and overalls, and "a slouch hat peaked in the center;" the sleeves of his shirt were rolled up. The men with him, fifteen or twenty in number, were dressed the same way. He was trying to keep the boys from entering the tent, from disturbing the exhibition and from interfering with the men in their work. Where a person appears to be in charge or control of a portion of a circus tent and the contiguous grounds, and on the night when the license expires is openly engaged with others in taking down the tent, a jury could reasonably infer from his acts, his dress, the nature of the work he is doing, the number of men assisting him and all the special circumstances of the case, that the person was in the employ of the defendants and with their assent and authority was in control of their property.

Being in charge of the work, in view of the peculiar character of his employment, it also might be found that in driving the boys away he was acting within its scope and purpose, although perhaps the particular means he made use of were not intended nor contemplated by his employers. *Kimball v. Cushman*, 103 Mass. 194. *Perlstein v. American Express Co.* 177 Mass. 530. *McKeon v. New York, New Haven, & Hartford Railroad*, 183 Mass. 271. *Grant v. Singer Manuf. Co.* 190 Mass. 489. *Murphy v. Bay State Wine & Spirit Co.* 212 Mass. 285. *Coughlin v. Rosen*, 220 Mass. 220.

The defendants rely on *Trombley v. Stebens-Duryea Co.* 206 Mass. 516, where it was held, that from the mere possession of an automobile no presumption arises that the person operating it is the servant or agent of the owner. In the case at bar, it could be found that the servant was in charge of the defendants' property at their place of business; that he was engaged in protecting it, in doing their work, promoting their interests; and not engaged in a private venture of his own. In *Fletcher v. Willis*, 180 Mass. 243, where the servant of the proprietor of a race track pushed the plaintiff from the top of a fence, there was nothing to show, nor was there anything from which an inference could be drawn to indicate the purpose for which the servant was employed.

The defendants asked the judge to rule that, if the person who threw the brick was "on a frolic of his own," the defendants were not liable. The record shows that this request was given in substance.

The defendants further requested, that if the act of the person in throwing the missile was to punish the person at whom it was thrown, or "to wreak his own vengeance upon the person," the defendants were not liable. The jury were told there could be no recovery if the employee was "on a frolic of his own," that he must be acting within the scope of his authority, and further, "if the man who threw the brick was doing that for a pastime of his own, the defendants are not liable." In view of all that was said, it is evident the jury were sufficiently instructed on this aspect of the case.

The defendants also requested rulings that, if the person or persons at whom the missiles were thrown were not at the time interfering with the defendants' property, but were running away, the defendants are not liable. There was evidence showing that the boys had been driven away more than once; that they came back and would not leave the premises when requested. It might be found that they then were interfering with the men or attempting to enter the circus tent; that the servant, in the performance of his duty, was attempting to prevent these acts. In view of the language of the judge, we do not think that the defendants were in any way harmed by the failure to give these specific requests.

Subject to the defendants' exception, the judge said to the jury, "The defendants have produced no evidence as to who the party was that threw the missile, if any one threw it. And whether or not that evidence is in the defendants' possession you may take into account as an inference bearing upon the relations between the parties. You may infer from the fact of no witness having been called by the defendants touching the relations between the defendants and the man in their employ who is said to have thrown the brick, you may infer if he was called that his testimony would not help the defendants." While the judge well might have omitted this instruction yet it cannot be held to have been erroneous. *D'Addio v. Hinckley Rendering Co.* 213 Mass. 465, 469. We do not interpret this ruling as referring to a failure on the part of the defendants to call the man who threw the brick, a reference which hardly would have been justified. *McKim v. Foley*, 170 Mass. 426, 428. *Buckley v. Boston Elevated Railway*, 215 Mass. 50, 55, 56.

The statement of the servant when driving the boys away, "Get to . . . out of here," and other similar remarks accompanying and explaining his acts, were admissible. See *Conklin v. Consolidated Railway*, 196 Mass. 302.

We have considered all the exceptions argued by the defendants in their brief, and we see no error.

*Exceptions overruled.*

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BAY STATE STREET RAILWAY COMPANY vs. NORTH SHORE NEWS COMPANY.

Norfolk. October 21, 1916. — May 23, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

*Contract, Of indemnity, Construction, Validity.*

A contract made by a news company that, in consideration of the exclusive privilege of selling papers on all cars operated by a certain street railway company, it will, besides making certain payments in money, indemnify the street railway company for all loss or damage suffered on account of injuries received by newsboys in the employ of the news company "while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks" includes indemnity for the satisfaction of an execution issued against the street railway company, in an action brought against it by a newsboy employed by the news company who was kicked in the stomach by a conductor on a car of the street railway company when he was on the top step going into the car holding the two handles and was thrown to the ground and injured, and indemnity for expenses incurred by the street railway company in defending such action.

The liability of the news company under the unambiguous terms of the contract described above was *held* not to be affected by a provision in the contract that the news company should take out insurance to protect both companies from loss on account of "injuries to the employees of the news company on or about the cars and tracks of the street railway company," even if the liability described by the clause last quoted was not so broad.

An agreement by a news company to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks," is valid.

CONTRACT on a contract in writing to indemnify the plaintiff for all loss suffered by it on account of injuries to newsboys in the employ of the defendant, which is described more particularly below. Writ dated April 27, 1914.

In the Superior Court the case was submitted to *Chase, J.*, upon an agreed statement of facts as follows:

On July 1, 1911, the Boston and Northern Street Railway Company, now the Bay State Street Railway Company, the name having been changed by act of the Legislature, entered into an agreement with the North Shore News Company. Under this agreement the street railway company granted to the news company the exclusive privilege of selling papers on all cars operated by the street railway company during the term of five years from the first day of July, 1911, upon certain terms and conditions.

Paragraph four of the agreement was as follows: "4. That the said payments are made solely in consideration of the privilege herein granted and not as fares for newsboys in the employ of the News Company, who shall not be considered passengers for hire. And it is understood and agreed that the Street Railway Company shall not be liable to such employees of the News Company for injuries whether resulting or not from the negligence of the Street Railway Company, its officers, agents or servants. And the News Company hereby assumes and agrees to save the Street Railway Company harmless from all loss, cost or damage on account of injuries received by newsboys in its employ or wearing its badge while boarding, riding upon or leaving the cars of the Street Railway Company, or while on or about its tracks. And the News Company agrees to pay all cost and expense incurred by the Street Railway Company in defending any suits brought against it for damages for such injuries, as well as the amount of all damages, if any, recovered from the Street Railway Company for such injuries."

Paragraph six of the agreement was as follows: "6. That the News Company, and every assignee or transferee of the privilege herein granted or any part thereof, shall carry, in some company or companies approved by the Street Railway Company, insurance against liability for injuries to the employees of the News Company on or about the cars and tracks of the Street Railway Company, such insurance to be written in such form as to protect both the News Company and the Street Railway Company from loss on account of liability for such injuries. The policies of insurance shall be filed with the General Auditor of the Street Railway Company, and shall be in form satisfactory to him, and in such amount as he shall from time to time require."

On or about March 20, 1913, one David Higgins of Chelsea, a newsboy in the employ of the defendant, by his next friend, Thomas Higgins, brought an action in the Superior Court against the Bay State Street Railway Company, alleging in the declaration that the plaintiff was a newsboy and while on a car of the defendant was kicked by one of the agents or servants of the defendant and injured severely. The second count of the declaration alleged that the newsboy was assaulted by the defendant, its agents or servants by being kicked.

The defendant appeared by its attorneys, filed a general denial and moved for specifications, and the plaintiff specified, as the time and place of the acts alleged in the declaration, February 12, 1913, on Broadway near Clinton Street, Chelsea, at about half past four in the afternoon. On July 10, 1913, the defendant propounded thirty-six interrogatories to the plaintiff, in answer to some of which the plaintiff said in substance that he was on the top step going into the car holding the two handles, when he was kicked in the stomach by the conductor and was thrown to the ground upon the pavement and injured; that he could not state how many persons were on the car because he did not have time to see before he was kicked off the car by the conductor. At the time the injuries were received David Higgins was boarding the car for the purpose of selling newspapers for the defendant.

Due notice was given to the North Shore News Company to come in and defend the action, and on January 23, 1914, Blodgett, Jones, Burnham and Bingham, Esquires, attorneys for the North Shore News Company, entered their appearance for the defendant, which they withdrew, however, on January 30. On February 24, 1914, the case was tried before a jury, who found, in answer to a special question, that the defendant's conductor actually did kick the plaintiff, David Higgins, in the stomach, so that the conductor's foot came in such forcible contact with his person that his hold on the car was broken and he was knocked into the street. They assessed damages for the plaintiff in the sum of \$800. Costs were taxed amounting to \$53.05. Upon the judgment execution issued, which was paid by the Bay State Street Railway Company, the entire amount of the execution being \$857.85, including interest.

In the defence of this action the Bay State Street Railway Com-



pany incurred other expenses for attorneys' fees, medical testimony, and other necessary assistance, amounting to \$681.99, making the total amount paid on account of this case \$1,539.84, of which the Street Railway Company demanded payment from the news company on April 2, 1914. Payment was refused, and the street railway company thereupon brought this action.

It was agreed that the court might draw any proper inferences of fact from this agreed statement.

Upon the above agreed statement of facts the judge found for the plaintiff in the sum of \$1,611.79. From the judgment ordered by the judge in accordance with this finding the defendant appealed.

*H. V. Cunningham*, for the defendant.

*W. D. Turner*, for the plaintiff.

LORING, J. 1. We are of opinion that the injury to Higgins was within the contract by which the defendant agreed to save the plaintiff "harmless from all loss, cost or damage on account of injuries received by newsboys in its employ . . . while boarding, riding upon or leaving the cars of the Street Railway Company." The unambiguous terms of this agreement are not to be cut down by the fact (if it is a fact) that the policy which the defendant (by paragraph 6) was to carry for the plaintiff's benefit was not so broad.

2. The agreement here sued on is nothing more and nothing less than an agreement insuring the plaintiff against liability to newsboys "while boarding, riding upon or leaving the cars of the" plaintiff. Of its validity there can be no question. In his argument to the contrary the learned counsel for the defendant has overlooked the fact that the agreement is not with the newsboys but with a third person, to wit, the newsboys' employer.

*Judgment affirmed.*

## TIMOTHY S. COLLINS vs. CASUALTY COMPANY OF AMERICA.

Essex. November 4, 1915. — May 23, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; CROSBY, JJ.

*Insurance, Accident. Proximate Cause. Practice, Civil.* Province of jury, Charge of judge. *Evidence, Presumptions and burden of proof.*

In an action on a policy of accident insurance where by the terms of the policy the insurance was against "loss of life . . . resulting from bodily injuries . . . effected directly and independently of all other causes through accidental means," it appeared that the insured had a predisposition to rupture, that he accidentally fell and ruptured himself, that an operation, if not necessary, was the only proper way in which the injury should be treated, that thirteen days after the injury an operation was performed, that there was a satisfactory healing of the wound, but that thirteen days after the operation the insured died owing to some "obscure physiological poisoning due to certain unknown changes in the bodily functions brought about by etherization." It was *held*, (1) that the jury were warranted in finding that the predisposition to rupture was not a cause of the accident; and (2) that, the insured having come to his death through the etherization which was an incident of the operation that was the proper treatment of his accidental injury and which could be found to have been a necessary or proper result of such injury, a finding was warranted that his death resulted from bodily injuries "effected directly and independently of all other causes through accidental means."

St. 1907, c. 576, § 21, provides that "No . . . warranty made in the negotiation of a . . . policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such . . . warranty is made with actual intent to deceive or unless the matter . . . made a warranty increased the risk of loss." A warranty, contained in a policy issued by an accident insurance company insuring against loss of life, stated that the insured was in sound condition physically. He had had from his birth a predisposition to rupture, and after taking out the policy accidentally fell and ruptured himself, in consequence of which he died. In an action on the policy there was no evidence that the warranty of sound condition was made with intent to deceive. *Held*, that, assuming that a predisposition to rupture was unsoundness of condition, it was a question of fact for the jury to determine whether such unsoundness increased the risk of loss.

In the same case there was evidence, introduced by the defendant and not objected to by the plaintiff, not only that a predisposition to rupture increased the risk of loss but also that accident insurance companies generally did not take such a risk. *Held*, that the jury were not bound to believe the testimony to this effect and might make a finding to the contrary.

In the same case the judge in the course of his charge to the jury said, "All parties to a contract, whatsoever contract it may be, who sign it or accept it, are presumed

to know the terms thereof; but this presumption is not conclusive." It was plain from the context that this was said by the judge in connection with the question whether the insured had an actual intent to deceive the defendant in the statements made by him in the warranties. *Held*, that in the connection in which it was used and must have been understood the statement of the judge was correct.

LORING, J. This is an action by the beneficiary named in a policy of accident insurance to recover for the death of the insured. The insured on December 15, 1910, went from his office with a coal hod to get some coal from a coal bin near by. While returning with the coal he slipped, fell and ruptured himself. It was in evidence and must be taken to have been conceded, that the insured from birth had a predisposition to rupture because the inguinal canal was not closed as it ought to have been, but that by virtue of his muscles the opening had been kept shut until the accident here in question. There was also evidence that the rupture was an irreducible one and that for a man of the insured's years and condition a suspensory truss was not the treatment to be adopted, but that an operation, if not necessary, was the only proper way in which the injury should be treated, and that the insured was so advised. In consequence of that advice he was operated upon on December 28, 1910, and died on January 10, 1911. It appeared that so far as the immediate operation was concerned it was successful, that is to say, there was a satisfactory healing of the wound. But some three or four days after the operation the insured was taken with vomiting, was unable to hold his food for any protracted period and died owing to certain "obscure physiological poisoning brought about by some unknown changes in the bodily functions due to etherization."

By the terms of the policy the defendant insured the assured "Against loss of life, limb, sight and time resulting from bodily injuries . . . effected directly and independently of all other causes through accidental means." The policy further provided under the heading "Indemnity for Loss of Life, Limb or Sight" that: "If any one of the losses named in this section shall result directly and independently of all other causes from such injuries within ninety days from date of accident, but not necessarily causing immediate and continuous disability, the Company will pay the sum set opposite such loss." The jury found a verdict which represented the sum payable for death happening in ac-

cordance with the terms of the policy and the case is here on exceptions taken by the defendant.

1. The first exception argued by the defendant is that taken to the refusal of the presiding judge to make the first and twenty-sixth rulings asked for by it.\*

The first contention made by the defendant in support of these exceptions is that the insured's predisposition to rupture was a cause of the injury to the insured and therefore that there was no evidence on which the jury could find that the death of the insured resulted from a bodily injury effected directly and independently of all other causes through accidental means. But we are of opinion that the jury were warranted in finding that the predisposition to rupture was not a cause of the accident. It is not unlike the streptococcus germs in the nose in *Smith v. Travelers Ins. Co.* 219 Mass. 147, and the disease of diabetes in *Cheswell v. Fraternal Accident Association*, 199 Mass. 267. See also in this connection *Bohaker v. Travelers Ins. Co.* 215 Mass. 32.

The more difficult question arises however under the defendant's contention that there was no evidence that the death of the insured resulted "directly and independently of all other causes" from the accidental fall which the assured suffered on December 15, 1910. So far as we know the true construction of that provision of the policy is a question of novel impression. The provision of the policy in question in *Cheswell v. Fraternal Accident Association*, *ubi supra*, was that the company would agree to pay to the beneficiary "the sum of twelve hundred fifty dollars if the death of the certificate holder shall result from such injuries alone" within ninety days from the date of said accident. And there was a similar provision in *Freeman v. Mercantile Mutual Accident Association*, 156 Mass. 351. But the decisions in those cases do not go far as a help in the decision of the case at bar. Neither the plaintiff nor the defendant has brought to our attention any case involving a consideration of the proper construction of such a clause in a policy of accident insurance and no case of that kind has come to our attention.

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\* The presiding judge was Quinn, J. The rulings referred to were as follows: "First: On all the evidence the plaintiff is not entitled to recover."

"Twenty-sixth: If the plaintiff is unable to establish the precise cause of the insured's death, he cannot recover."

The defendant has not laid stress upon the provision of the policy that the death must result "directly" from the injury in question. This may be because of the provision that the injury need not cause "immediate" disability. Under these circumstances we do not stop to consider that provision and proceed to the consideration of the provision that death must result from the injury "independently of all other causes."

We are of opinion that, in a case where a surgical operation becomes necessary in order to deal properly with the effects of an injury within the policy of accident insurance and the insured dies as a result of the operation, death results "independently of all other causes from such injuries." Although he dies from some "obscure physiological poisoning due to certain unknown changes in the bodily functions brought about by etherization," it is plain, and in fact it was testified to by one of the doctors, that "the operation consisted of the etherization, just as essentially as it did of my [the] operation on him, cutting with the knife." If the jury found in the case at bar (as indeed they must have found) that the occasion of the death was an "obscure physiological poisoning due to certain unknown changes in the bodily functions brought about by etherization," they were bound, or at least they were warranted in finding that that was a mere incident of the operation, which operation again was the only proper way of dealing with the rupture which was caused by "accidental means" within the terms of the policy. If they did so find the insured came to his death from an incident of what was a proper treatment of the injury (which injury was within the policy). If this effect of etherization was an incident of the operation and that was found to be a necessary or proper result of the injury, it was not another outside cause but an incident of a cause within the policy and in that case death resulted "directly and independently of all other causes from such [the] injuries."

It follows that there was evidence for the jury and the first ruling was properly refused. It follows also that if the jury drew the inferences we have just stated the plaintiff had established the cause of the death of the insured and the twenty-sixth ruling ought not to have been given.

2. From what has been said it is evident that the exception

taken to the refusal to give the twelfth ruling asked for was rightly refused.\*

As we have held already, the question for the jury was whether the insured died from the operation including one of its incidents. If he did, it was as matter of law not a cause of the death and therefore the twelfth ruling asked for was wrong.

3. The twenty-first ruling asked for was rightly refused.†

By St. 1907, c. 576, § 21, it is provided that "No . . . warranty made in the negotiation of a . . . policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such . . . warranty is made with actual intent to deceive or unless the matter . . . made a warranty increased the risk of loss." It is settled that the words "in the negotiation of a . . . policy of insurance" included the issuance of the policy itself. *Everson v. General Accident, Fire & Life Assurance Corp. Ltd.* 202 Mass. 169.

There was no evidence that this warranty was made with the intent to deceive. The only question was whether it was a warranty which increased the risk of loss. The burden of proving that this warranty increased the risk of loss was upon the defendant. As a general rule it is for the jury to decide whether as matter of fact an affirmative defence has been made out in the evidence. *Leary v. William G. Webber Co.* 210 Mass. 68.

Without stopping to consider the question whether on the evidence there was a question of fact for the jury with respect to the fact that the insured was not in sound condition physically, (in view of the fact that thirty per cent of all men have a predisposition to rupture,) it was for the jury to determine whether that fact increased the risk of loss.

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\* The ruling referred to was as follows: "Twelfth: If the jury believe that the wearing of a truss would have adequately controlled the hernia, and if they further believe that Patrick H. Collins voluntarily submitted himself to a surgical operation, and if they believe further that the cause of his death was the surgical operation, it cannot be said that his death resulted directly and independently of all other causes from the injuries received on December 15, 1910."

† The ruling referred to was as follows: "Twenty-first: Statement Q in the schedule of warranties contained in the policy issued to Patrick H. Collins, that he was in sound condition physically, was untrue and the matter there made a warranty increased the risk of loss."

There was evidence directly to the fact that not only that a predisposition to rupture increased the risk of loss, but that accident insurance companies generally did not take a risk in such a case. But the jury were not bound to believe that testimony. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314. And a predisposition to rupture does not come within the cases of *Brown v. Greenfield Life Association*, 172 Mass. 498; *Rainger v. Boston Mutual Life Association*, 167 Mass. 109; *Dolan v. Mutual Reserve Fund Life Association*, 173 Mass. 197.

4. In his charge to the jury the presiding judge said: "All parties to a contract, whatsoever contract it may be, who sign it or accept it, are presumed to know the terms thereof; but this presumption is not conclusive." It is plain from the context, that this was said in connection with the question whether the insured had an actual intent to deceive the defendant in respect to the statements in the warranties made by the insured including that marked Q. In that connection the instruction was correct. The defendant has argued that the statement was not in terms so limited. But we are of opinion that that contention is not correct.

*Exceptions overruled.*

The case was submitted on briefs.

*F. Peabody, E. K. Arnold & S. H. Batchelder*, for the defendant.

*J. P. Sweeney & L. S. Cox*, for the plaintiff.

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NEW ENGLAND TRUST COMPANY, trustee, vs. HARRIET  
L. WHITE & others.

Suffolk. March 13, 1916. — May 24, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Tax, On legacies and successions. Statute, Construction, Repeal.*

It was not the intention of the Legislature, when by St. 1909, c. 268, they re-enacted the whole of St. 1907, c. 563, § 1, with a single amendment placing an adoptive father or mother on an equality with a natural parent, to change the existing law relating to the rate of taxation upon property subject to a succession tax by repealing § 25 of St. 1907, c. 563, which provides that "This act [St. 1907,

c. 563] shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date."

CROSBY, J. This is a petition for instructions, brought by the trustee under the will of Lucy Josephine Parker, who died in October, 1902.\*

By the sixteenth paragraph of her will, she left the residue of her estate to the plaintiff in trust to pay over one half of the net income to her brother during his life, and the remaining one half of the net income to her sister during her life. Upon the death of the brother the one half of the income previously paid to him is directed to be paid to his daughter Harriet L. Brown, niece of the testatrix, during her life. Upon the death of the sister the one half of the income previously paid to her is directed to be paid to her three children, namely, Rachel M. Sedgwick, Josephine Griffith and Henry Griffith, nieces and nephew of the testatrix, until the death of the last survivor. The brother of the testatrix died on October 5, 1908, and the life interest of Harriet L. Brown in one half the trust fund came into possession and enjoyment by her on that date. The sister of the testatrix died on October 24, 1915, and the life interest of her three children above named came into possession and enjoyment by them on that date. The question presented is whether these life interests of the nephew and nieces of the testatrix are taxable under the legacy and succession tax laws of the Commonwealth at the rate of five per cent of their value or at some lesser rate.

At the date of the death of the testatrix on October 19, 1902, it is plain that these life interests were taxable, under R. L. c. 15, § 1, at the rate of five per cent. Under the provisions of § 4 of this chapter, such taxes were payable "by the executors, administrators or trustees, at the expiration of two years after the date of their giving bond; but if legacies or distributive shares are paid within the two years, the taxes thereon shall be payable at the same time." The time when such taxes should be payable was later changed by St. 1902, c. 473, § 1, which provided that "the tax on such property shall not be payable nor interest begin to run

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\* The suit was brought in the Supreme Judicial Court and with the consent of the parties was reserved by *Loring, J.*, for determination by the full court.



thereon until the person or persons entitled thereto shall come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property."

By St. 1907, c. 563, important changes were made in the laws regulating legacies and succession taxes. It imposed a tax subject to certain exemptions upon all successions including those to direct as well as to collateral heirs to be computed upon the value of the property and the degree of relationship between the parties. Section 25 of this statute provides as follows: "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date; but said estates and property shall remain subject to the provisions of the laws in force prior to the passage of this act."

It is conceded by these legatees that the passage of St. 1907, c. 563, did not affect the tax upon the legacies in question, but that they remained subject to the law in force at the date of the death of the testatrix except that the time for payment under St. 1902, c. 473, was extended until such time as the persons entitled actually came into possession of the property.

It is the contention, however, of the legatees, that under St. 1909, c. 268, § 2, the provisions of St. 1907, c. 563, were made applicable to the interests received by them respectively, and that the value of each interest in excess of \$25,000 is taxable at the rate of four per cent, and that the value of each interest whose value is less than \$25,000 is taxable at the rate of three per cent.

The Treasurer and Receiver General contends that St. 1909, c. 268, does not apply to the interests of these legatees, but that such interests are taxable under the law as it existed before the passage of the statute of 1909, at the rate of five per cent of their value. The determination of this question depends upon the intention of the Legislature as expressed in St. 1909, c. 268.

From an examination of § 1 of St. 1907, c. 563, it appears that property passing to an adopted child or his lineal descendant was subject to the tax in accordance with class A with an exemption of \$10,000. This rate and exemption, however, did not apply to

property which passed from an adopted child to an adoptive parent.

It seems plain that it was the intention of the Legislature in enacting St. 1909, c. 268, to correct an apparent omission and manifest injustice in St. 1907, c. 563, § 1, thereby placing an adoptive father or mother on an equality with a natural parent. This view is strengthened by reference to the title to the act which is: "An Act relative to the taxation of property passing by will or under the laws regulating intestate succession from an adopted child to the adoptive parent or lineal ancestor thereof." The title to the act in terms is limited to the taxation of successions from an adopted child to an adoptive parent or lineal ancestor thereof. It was said in *Field v. Gooding*, 106 Mass. 310, at page 313, "although the title is no part of an act, yet, where the enacting clause is doubtful or too general, the title may be resorted to for explanation, or in restraint of its generality."

The second section of this statute enacts that "The provisions of this act shall apply to all cases in which the said tax remains unpaid at the date of the passage hereof." This section is to be construed as applying only to the new subject added to the pre-existing law by the first section, namely, to unpaid taxes due or coming due from any adoptive parent. As to such taxes the statute applies whether due before or after the date when the statute went into effect.

We are of opinion that it was not the intention of the Legislature by re-enacting St. 1907, c. 563, § 1, with the single amendment thereto above referred to, (St. 1909, c. 268,) thereby to change the existing law relating to the rate of taxation upon property subject to a succession tax. Such interpretation is not to be inferred in the absence of a plain intention to that effect. The conclusion reached is not at variance with that adopted by this court in *Attorney General v. Stone*, 209 Mass. 186, 192, which held that the amendment adopted by the passage of St. 1909, c. 527, § 10, which was a provision similar to St. 1909, c. 268, § 2, applied to unpaid succession taxes imposed by St. 1902, c. 473, as well as those imposed by St. 1907, c. 563. The amendment considered in *Attorney General v. Stone* merely changed the date when taxes should become payable.

The statute (St. 1907, c. 563, § 1) is entitled: "An Act relative

to the taxation of legacies and successions." The amending statute (St. 1909, c. 527) bears identically the same title, and both statutes, as was said in *Attorney General v. Stone*, were designed to deal with the whole subject of the taxation of successions; many changes in the earlier statute were made by St. 1909, c. 527, including a change in the date when taxes should become payable. It is manifest that the Legislature intended that the time for payment should be the same for succession taxes payable under either statute.

As St. 1909, c. 268, was enacted to correct an obvious omission in St. 1907, it cannot be held to have been the intention of the Legislature by its adoption to repeal § 25 of St. 1907, c. 563. Such an interpretation would result in a change in the rate of taxation as it had theretofore existed, and is not to be inferred in the absence of a clear legislative purpose to that effect. It will not be presumed to have been intended to change the law so as to create an inequality between legatees subject to a succession tax, unless the language used plainly requires that conclusion.

It follows that St. 1909, c. 268, did not alter the rate for which the four legatees in question are taxable, and that their interests are all taxable at the rate of five per cent of their values as stated in the bill. The taxes on these legacies are payable one year after the times when the legatees respectively acquired possession thereof. St. 1909, c. 527, § 2. *Attorney General v. Stone, supra*. The tax on the interest of Harriet L. White became due on October 5, 1909, and bears interest at the rate of six per cent from that date. The tax on the interests of the other legatees will not become due until October 24, 1916.

A decree is to be entered in accordance with this opinion.

*So ordered.*

*B. Corneau*, for the defendant Harriet L. White and others.

*W. H. Hitchcock*, Assistant Attorney General, for the Treasurer and Receiver General.

AMERICAN SURETY COMPANY OF NEW YORK *vs.* ALFRED C.  
VINTON, administrator with the will annexed, & another.

SAME *vs.* SAME.

SAME *vs.* SAME.

MARLAND L. PRATT *vs.* AMERICAN SURETY COMPANY  
OF NEW YORK.

ALFRED C. VINTON, administrator with the will annexed, *vs.* SAME.

Suffolk. March 16, 1916. — May 24, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Practice, Civil, Severance of joint liability by death. Surety. Guarantor.  
Contract. Assignment.*

A joint liability in contract is severed by the death of one of the joint promisors and thereupon the promisee may proceed severally either against the surviving promisor or against the representative of the estate of the deceased promisor.

In consideration of a surety company becoming surety on each of the bonds given separately by two joint trustees, the two trustees made a contract in writing with the surety company agreeing to indemnify it for all liabilities incurred upon the bonds. One of the trustees from time to time misappropriated to his own use securities and money belonging to the trust fund. His co-trustee negligently contributed to this result either by signing the transfers of certificates of the shares of stock misappropriated or by authorizing the embezzling trustee by power of attorney to sign his name as trustee. The acts of the embezzling trustee were such that the surety company should have been put upon its guard, but it had no actual knowledge of the misuse of the trust funds and acted in good faith. In an action on the bond of the embezzling trustee the surety company was held liable as surety and paid a judgment for the amount of the sum misappropriated. The co-trustee whose negligence had contributed to the misappropriation died, and the surety company sued the executor of his will on the agreement of indemnity given to it by the trustees. The defendant contended that the surety company had lost its right of action on the agreement by its negligence in not discovering earlier the fact that the embezzling trustee was misappropriating the trust funds. *Held*, that, the contract being one of guaranty given for the protection of the plaintiff, it owed no duty to the defendant's testator, who was one of the joint guarantors, to keep him advised as to the dealings with the trust property by his co-trustee and co-guarantor, it being the business of the defendant's testator to protect himself by seeing that his co-trustee performed the guaranteed duties.

In the action described above one of the claims made by the plaintiff was for unpaid premiums on the bonds from 1904 to 1912 inclusive. It appeared that in November, 1902, a new trustee took possession of what remained of the trust property

and that in December, 1902, the embezzling trustee was removed. In February, 1904, the action on his bond was brought. In May, 1905, the co-trustee, the defendant's testator, died. By the agreement of indemnity the trustees had agreed to pay to the surety company, the plaintiff, "as fee or premium, \$50, on the 20th day of July, in each year hereafter until we shall serve upon the surety company a certified copy of an order of court releasing or cancelling said bond or other competent written legal evidence of the termination of its liability as surety upon such bond." *Held*, that, as the embezzling trustee was removed in December, 1902, no liability could have accrued against a surety for him by reason of his conduct after that date, and that, as the defendant's testator died in May, 1905, the only premium for which his estate could be held was that due on July 20, 1904, for \$50 with interest thereon to the date of his death.

In the action described above one of the defendants held assignments of the interests of the two trustees as beneficiaries of the income of the trust fund as security for their indebtedness to him. *Held*, that this defendant as assignee stood in no better position than his assignors.

DE COURCY, J. In 1896, Henry E. Weston and William H. Weston were appointed trustees under the will of Nathaniel Weston, and gave separate bonds to the judge of probate, in the penal sum of \$150,000 each, with the American Surety Company of New York as surety. Henry E. Weston was removed as trustee in 1902. In 1904 an action was begun against him and the surety company on his probate bond; judgment for the penal sum was entered in 1905, and the case was referred to an assessor to determine the amount for which execution should issue. Delay in the proceedings was occasioned by the death of William H. Weston in 1905 and by controversies over the allowance of his will. The assessor filed his report in February, 1913, and the case was brought before this court on report. *Harmon v. Weston*, 215 Mass. 242.

In accordance with the rescript the surety company paid to Cogswell, the present trustee under the will of Nathaniel Weston, the sum of \$184,839.52, which included costs and interest from May 1, 1905, and Cogswell subsequently repaid to the surety company the sum of \$20,000 on account of the share of Henry E. Weston in the income of the trust fund accruing subsequent to May 1, 1905.

Alfred C. Vinton (herein called the defendant) was appointed administrator with the will annexed of William H. Weston in 1911; and thereafter duly represented the estate insolvent. The surety company (herein referred to as the plaintiff) seasonably presented to the commissioners three claims; one for \$164,839.52, money paid in satisfaction of its liability on the bond of the co-trustee

Henry E. Weston, already mentioned; another for \$4,368.32, legal expenses incurred in consequence of having executed the bonds as surety; and a third claim for \$900, being premiums on the bonds since 1903. From the report of the commissioners appeals were filed and were entered in the Superior Court by the plaintiff surety company, the defendant Vinton and the defendant Pratt, a creditor of the estate. The five appeals were consolidated and were heard in the Superior Court and now are before us on a report.\*

1. The liability of William H. Weston's estate to the surety company has been argued mainly as it arises out of the agreement of indemnity, which was given to the surety company by Henry E. Weston and William H. Weston at the time the probate bonds were executed. By its terms this agreement created a joint liability to indemnify and save harmless the surety company from all damages, liabilities and expenses whatsoever. See *Harmon v. Weston*, *ubi supra*. The cause of action was severed by the death of William H. Weston and either could be proceeded against. *New Haven & Northampton Co. v. Hayden*, 119 Mass. 361.

It is strongly urged by the defendants that the surety company has lost its right of action against them by its negligence in not earlier discovering the fact that Henry E. Weston was withdrawing and appropriating to his own use the securities and money of the trust estate. The tabulated statement prepared by the defendants, showing the dealings of Henry with the trust assets, indicates that officers of the surety company should have been put upon their guard. On the other hand, it seems clear that William H. Weston himself contributed to the proceedings which resulted in the loss, either by signing the transfers of stock or by authorizing his co-trustee to do so by a power of attorney. It is not contended that the surety company actually knew of the misuse of the trust fund or that it acted in bad faith. And the controlling consideration is that the legal duty of the plaintiff surety company was not that of a surety holding trust property as collateral security. The indemnity agreement was given to protect the surety company and not the indemnitors. The company was in the position of the obligee of a bond with sureties given to a creditor by a debtor. Such creditor owes no duty of active diligence to take care of the interest of the surety; and his mere inaction will not discharge the

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\* Made by *Irwin, J.*

surety, unless it amounts to fraud or concealment. The plaintiff surety company owed no legal duty to William H. Weston to keep him advised of his brother's dealings with the trust property; and as he was surety for his brother Henry under the agreement of indemnity, it devolved upon him to protect himself by seeing that his brother performed the guaranteed duties. *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85. *Welch v. Walsh*, 177 Mass. 555.

As the plaintiff company is entitled to recover under the agreement of indemnity, it is not necessary to consider its right to be subrogated by operation of law to the rights of the trust estate against the trustees, on paying the amount of the defalcation, — a right expressly reserved in said agreement. *Blake v. Traders' National Bank*, 145 Mass. 13. See *Harmon v. Weston*, *ubi supra*.

In the action on the probate bond judgment was entered as of May 1, 1905. The amount of the deficit in the principal of the trust fund which the surety company had to make good was \$123,-825.99. See *Harmon v. Weston*, *ubi supra*. This amount it is entitled to have allowed, with interest thereon to May 21, 1905, the date of the death of the debtor William H. Weston, — in accordance with the warrant of the Probate Court to the commissioners. *Williams v. American Bank*, 4 Met. 317. *Bowers v. Hammond*, 139 Mass. 360.

2. Under the terms of the indemnity agreement the surety company was entitled to reimbursement for legal expenses incurred. It could prove against the estate of William H. Weston debts due at any date before the return of the commission. In computing the net amount due on May 21, 1905, the time of the death of the deceased, the commissioners properly deducted the rebate of interest, in accordance with the warrant issued to them. *Westfield v. Mayo*, 122 Mass. 100. *Deane v. Caldwell*, 127 Mass. 242.

3. The third claim of the plaintiff company is for unpaid premiums from 1904 to 1912 inclusive. As already appears, Cogswell, the new trustee, took possession of the remainder of the trust property in November, 1902. Henry E. Weston was removed as trustee in December, 1902, and action was brought on his bond on February 18, 1904.

William H. Weston died on May 21, 1905. By the agreement of indemnity each of the Westons promised to pay to the surety

company "as fee or premium, Fifty dollars (\$50.00), on the 20th day of July, in each year hereafter until we shall serve upon the Surety Company a certified copy of an Order of Court releasing or cancelling said Bond or other competent written legal evidence of the termination of its liability as surety upon such bond."

The premium, payable yearly in advance, is the consideration received by the company for assuming or continuing the legal responsibility of a surety for the ensuing year. As Henry E. Weston ceased to be trustee in December, 1902, no liability could have been incurred by him as trustee or by a surety for him, by reason of his conduct after that date. And the facts would fully warrant the finding of a waiver by the company of written evidence of his removal. After the appointment of Mr. Cogswell as a trustee in November, 1902, the trust securities were taken by him to the office of the plaintiff company, and left there until after Henry was removed as trustee. And as William H. Weston died in May, 1905, the only premium for which his estate can be held is that due on July 20, 1904, for \$50, with interest thereon to the date of his death.

The defendant Pratt, who holds assignments of the interest of the Westons in the income of the trust estate as security for their indebtedness to him, stands in no better position than his assignors. Subrogation "operates in equity as an assignment of the debt and the securities to the surety. The right of subrogation and the equitable assignment relate back to the time of entering into the contract of suretyship, as against the principal and those claiming under him." Sheldon on Subrogation, (2d ed.) § 87. *Belknap v. Belknap*, 5 Allen, 468.

Judgment is to be entered on the three claims of the plaintiff in accordance with this opinion. R. L. c. 142, § 13. *Ripley v. Collins*, 162 Mass. 450. The cross appeals are to be dismissed.

*Ordered accordingly.*

*H. Wheeler*, for the American Surety Company of New York.

*A. C. Vinton*, administrator of the estate of William H. Weston,  
*pro se.*

*J. H. Stone*, for Marland L. Pratt.



JOHN S. PHIPPS & another vs. ELIZA V. CROWELL & others.

Barnstable. March 14, 1916. — May 25, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Adverse Possession.*

Where one and his successors in title entered a peninsula of land containing about six hundred acres under a deed purporting to convey the entire title to the whole tract, which was recorded in the registry of deeds, and for a period of more than twenty years made use of the various parts of the peninsula, respectively arable land, marsh and woodland, for such purposes as usually accompany exclusive ownership of like property, a title by adverse possession was held to have been established.

DE COURCY, J. The exceptions of the respondents relate only to the land designated as "Parcel No. 1." This is a peninsula of about six hundred acres, extending southwesterly from the southerly side of the town of Yarmouth into Nantucket Sound, and locally known as Point Gammon or Great Island. It is conceded that the petitioners have a good record title to all of the tract with the exception of an undivided one half interest in a portion of the partition land, so called. We need not consider the petitioners' contention that they have a good record title to this portion also, acquired through the deed given by the sole heir of Alexander Crowell, as the finding of the Land Court\* is based upon their title gained by adverse possession.

In 1872 Samuel R. Payson bought Point Gammon for a summer residence and acquired title by deeds from the several owners of record. He occupied the place for a summer home and kept a farmer on the premises throughout the year. Whether his possession, especially after the date of his deed from Crowell, was of such a kind as is required for gaining title by adverse possession need not be determined.

In 1883 Payson conveyed the entire Parcel No. 1 to Charles B. Cory. The peninsula was bounded by water on three sides. Across the narrow portion of the neck near the northeasterly part of the property, and running from the sound on one side to Lewis

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\* Made by Davis, J.

Bay on the other, Cory erected a substantial fence more than six feet in height. From 1883 to 1907 he and his successors in title excluded the public from the property, and a gate-keeper turned back those who attempted to enter the premises. In addition, Cory erected elaborate farm and other buildings on the locus, laid out golf links covering about one hundred acres, fenced off a large tract for a game park, and expended more than \$100,000 on the improvement of the property. He and his family lived at Point Gammon the greater part of every year, and his employees live there throughout the year. In 1901 he conveyed all but fifty acres to a corporation, and the title to all of the locus later passed to the petitioners. Since 1883, Cory and his successors in title have cultivated the arable land in rotation, and used the remainder of the locus for the purposes for which it was adapted.

The respondents' exceptions are to the findings by the Land Court of title in the petitioners acquired by adverse possession. We cannot say that the evidence does not fully warrant that finding. At least since 1883, when Payson conveyed to Cory the entire interest in Parcel No. 1, there has been exclusive possession of the entire locus maintained by the petitioners and their predecessors under a claim of title. The acts of dominion exercised by them were open, adverse and continuous; they indicated a claim on the part of the possessors of exclusive title to the entire premises; and the use they made of the various parts of the peninsula, arable, marsh and woodland, was in harmony with that claim, and was of such character as usually accompanies exclusive ownership of like property. *Keith v. Kennard*, 222 Mass. 398. *Tufts v. Charlestown*, 117 Mass. 401. *Andrew v. Nantasket Beach Railroad*, 152 Mass. 506. *Houghton v. Wilhelmy*, 157 Mass. 521.

The record does not disclose the basis for the respondent Eliza V. Crowell's claim of an interest as tenant in common in the one eleventh part set off to Alexander Crowell. But, assuming that she had such interest, it is clear that Cory entered, not as a tenant in common but as sole owner, under a deed purporting to convey the entire interest in the locus. She had constructive notice of this from the recording of his deed. And his notorious acts, already referred to, indicated a possession that was exclusive, and constituted notice to all the world, including the respondent, of an adverse claim of title. *Joyce v. Dyer*, 189 Mass. 64, 68.

*Parker v. Proprietors of Locks & Canals*, 3 Met. 91. *Samuels v. Borrowscale*, 104 Mass. 207. *Ball v. Allen*, 216 Mass. 469. 10 L. R. A. (N. S.) 185, note.

*Exceptions overruled.*

*E. M. Bennett*, for the respondents.

*W. H. White*, for the petitioners.

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FANNIE B. HOWARD *vs.* CENTRAL AMUSEMENT COMPANY  
& another.

W. FRANK HOWARD *vs.* SAME.

Essex. March 28, 1916. — May 25, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence*, Of one controlling real estate. *Nuisance*. *Practice, Civil*, Exceptions.  
*Pleading, Civil*, Declaration. *Joint Tortfeasors*.

One, who places and maintains a stucco ornament negligently constructed and of improper materials on the front of a building belonging to him so that it projects over a public sidewalk and constitutes a continuing nuisance dangerous to persons using the way, does not escape liability for injuries caused by pieces of the stucco breaking off and falling on persons passing below by letting the building to another and taking no precaution to guard against the danger or to provide that the tenant should do so.

Where the owner and the tenant of a building were sued jointly for personal injuries caused by negligence in the construction and maintenance of the building, and at the trial of the action the jury, on evidence amply warranting such findings, returned a verdict for the defendant tenant and for the plaintiff against the defendant owner, an exception of the owner to a refusal of the presiding judge to rule that the plaintiff could not recover on the allegations of joint liability in the declaration must be overruled; because, even if the ruling should have been given, its refusal gave the defendant owner no ground for complaint, as by the verdict of the jury the defendant tenant was out of the case and there was nothing to prevent the entering of judgment for the plaintiff against the defendant owner, which would operate as a discontinuance against the defendant tenant and effect his discharge from liability.

TWO ACTIONS OF TORT, the first for personal injuries sustained on April 16, 1913, in front of the theatre building on Union Street in Lynn constructed and owned by the defendant Central Amusement Company and occupied as a tenant by the defendant Central

Amusement Operating Company, by reason of the falling upon the plaintiff of pieces of stucco defectively and negligently placed on the front of the building; and the second action by the husband of the plaintiff in the first action for expenses incurred by reason of the injuries to that plaintiff. Writs dated July 3, 1913.

In the Superior Court the cases were tried together before *Quinn, J.* The material evidence is described in the opinion. At the close of the evidence the defendant Central Amusement Company asked in each of the cases for certain rulings, among which were the following:

"1. Upon all the evidence the plaintiff cannot recover in the above action.

"2. Upon the allegations in the plaintiff's declaration the plaintiff cannot recover in this action.

"3. Upon the evidence in the case the defendant was not negligent.

"4. If the jury find that the piece of stucco actually fell as alleged, the cause of its falling, upon the evidence, is conjectural and is as consistent with due care on the part of the defendant as with lack of due care."

"6. If the fall of the piece of stucco was caused by the lack of proper securing of the concrete ornaments on the wall and the defendant had no notice of this, but had entrusted the work to a competent contractor, the defendant is not liable for the stucco work falling."

"9. The evidence introduced in the case does not sustain the allegations in the declaration."

The judge refused to make these rulings, and submitted the cases to the jury, who returned a verdict in each case for the defendant Central Amusement Operating Company and a verdict in each case for the plaintiff against the defendant Central Amusement Company. That defendant alleged exceptions, including some which have become immaterial.

*J. T. Connolly, D. E. Hall & M. J. Mulkern*, for the Central Amusement Company, submitted a brief.

*F. E. Shaw, (G. F. Hogan with him,)* for the plaintiffs.

DE COURCY, J. The plaintiff Fannie B. Howard, (hereinafter called the plaintiff,) while walking on the sidewalk of Union Street in Lynn, was struck by a piece of concrete or stucco which broke

from one of the ornaments on the front of the defendant's building. The jury returned a verdict in favor of the tenant, the Central Amusement Operating Company, and against this defendant, the owner of the property.

1. The stucco ornament from which the piece broke and fell was about three feet wide and three and a half feet long, weighing four or five hundred pounds. There was evidence for the jury that in its composition improper materials had been used which would disintegrate and crumble when subjected to the influence of the weather and to the vibration caused by passing trains; that the ornament was so constructed that water could get between it and the bricks and there form ice, tending to throw it off from the main building; and that it was not securely joined to the main structure by being built into the bricks or otherwise attached or supported. It could be found that the directors of the defendant, who supervised the construction of the building, not only ought to have anticipated the possibility of danger in this part of the permanent structure, but that their employee, King, who had charge of the work, expressly warned them that the cement which they substituted for white cement mortar, would not stand and that the stucco work was not being properly attached to the brick front. In short there was evidence for the jury that this ornamentation constituted a menace and danger to pedestrians on Union Street at the time the defendant let the building to the other corporation (the officers of which apparently were the same as those of the defendant), and that it took no precaution to guard against such danger, or to provide that the tenant should do so. Such a permanent condition of the premises constituted a continuing nuisance, dangerous to persons using the public way; and the letting of the premises did not relieve the defendant from liability for injuries suffered therefrom, due to its authorized and contemplated use. *Dalay v. Savage*, 145 Mass. 38. *Maloney v. Hayes*, 206 Mass. 1.

2. The foregoing disposes of the defendant's requests numbered 1, 3, 4 and 6. The others, with the exceptions of the second and ninth, were given in substance or sufficiently covered by the charge.

3. Requests two and nine raise a question of pleading. The plaintiff, instead of bringing separate actions against the landlord and the tenant, joined them in a single writ and declared upon negligence in the construction and the maintenance of the building.

Presumably, both could not be held in the absence of joint negligence. *Harriott v. Plimpton*, 166 Mass. 585. *Hunt v. New York, New Haven, & Hartford Railroad*, 212 Mass. 102. By the verdict of the jury, however, the tenant is out of the case. A verdict rendered by the jury as the result of deliberation is as effectual in this regard as one rendered by direction of the court. *Warren v. Boston & Maine Railroad*, 163 Mass. 484. As appears from what has been said, there was ample evidence of the liability of the present defendant. If it be assumed that the second and ninth requests should have been given, that affords the present defendant no ground for complaint. Nothing stands in the way of entering judgment in favor of the plaintiff against the present defendant. Where two or more are sued jointly and the action is not discontinued against any, "taking judgment against one not only operates as a discontinuance, but constitutes a bar to obtaining judgment against the others." *Cameron v. Kanrich*, 201 Mass. 451, 452. There is nothing in *Contakis v. Flavio*, 221 Mass. 259, inconsistent with this conclusion. The technical difficulty about the entirety of a joint judgment has no application to proceedings before judgment. *Munroe v. Carlisle*, 176 Mass. 199, 201. It is not necessary to consider whether St. 1913, c. 716, is pertinent. The defendant has suffered no harm. *Smith v. Commonwealth*, 210 Mass. 259, 262.

4. There were exceptions to portions of the judge's charge, and to the admission of evidence. It would serve no useful purpose to discuss these in detail, — we have considered them and discover no reversible error.

*Exceptions overruled.*

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ROBERT H. GARDINER, trustee, vs. BIRNEY C. PARSONS,  
assignee, & another.

Suffolk. March 22, 1916. — May 26, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Assignment*, For the benefit of creditors. *Landlord and Tenant*. *Election*.

A creditor who signs and accepts a common law assignment by his debtor for the benefit of creditors agrees to participate in the distribution of the property ap-

propriated for the benefit of creditors upon the conditions designated in the instrument of assignment.

A lease, which was terminated by the lessor in accordance with its terms, contained the following provision: "and the Lessee covenants that in case of such termination . . . it will indemnify the Lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time . . . specified for the duration of the said term; or at the election of the Lessor the Lessee will upon such termination pay to the Lessor as damages such a sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named." In a suit in equity by the lessor against the lessee and his assignee for the benefit of creditors to enforce the rights of the plaintiff under the lease, he contended that when he entered to terminate the lease he exercised his election by claiming damages under this clause, which were to be ascertained as of the date of the termination of the lease, instead of claiming indemnity for his loss, the amount of which could not be determined until the period of the original term had ended. This contention was denied by the defendant who asserted that the plaintiff chose to claim indemnity. It was found by the trial judge that on the day of the termination of the lease the plaintiff by an oral agreement let a part of the premises to the former lessee, who continued in occupation. *Held*, that whether the plaintiff elected to claim damages or to claim indemnity was a question of fact with the burden of proof resting on the plaintiff, and that whether the plaintiff by letting a part of the premises to the former lessee waived his claim for damages also was a question of fact.

In the same case it was *held*, that, when the oral letting of a part of the premises was made to the former lessee, the former lessee must have known of the termination of his lease and consequently must have known that the covenant giving the plaintiff the right of action above described had become operative, and that the plaintiff by becoming a party to the lessee's assignment for the benefit of creditors thereby notified the assignee that he held or claimed to hold a provable claim or demand against the assignor who had executed the assignment seven days after his lease was terminated, leaving open the questions whether the plaintiff had elected to claim damages instead of indemnity and whether or not he had waived that claim.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on September 13, 1915, by Robert H. Gardiner of Gardiner in the State of Maine, as the trustee under a declaration of trust of the Perry Real Estate Trust, against Birney C. Parsons, as assignee for the benefit of creditors of the Lewis F. Perry and Whitney Company, a corporation, and the Lewis F. Perry and Whitney Company, setting forth the facts that are stated in the opinion and praying the ascertainment and enforcement of the plaintiff's rights under certain leases and for an accounting.

The case was heard by *Pierce, J.*, who made the findings that are stated in the opinion and reported the case for determination by this court.

*A. Whiteside*, (C. Bigelow with him,) for the plaintiff.

*Lee M. Friedman*, for the defendants.

BRALEY, J. By the terms of the common law assignment of the defendant lessee made for the benefit of creditors to which the plaintiff lessor seasonably became a party, "all claims are to be made up as if due on the date of these presents, adding or deducting interest as the case may be; provided, however, that in case the property hereby conveyed shall be sufficient therefor, then and in that case interest will be allowed on all claims to the time of making up the final dividend, at the rate provided in each account or obligation," and "The individuals, firms, and corporations, creditors of the party of the first part, who execute these presents, accept this conveyance in full payment, satisfaction, and discharge of all and singular their debts, claims, and demands, actions and causes of action against the party of the first part, existing at the date hereof, whether payable now or at some future time, and also all contingent claims against it as endorsers or otherwise, and absolutely release, acquit, and discharge the party of and from all such debts, claims, and demands, actions and causes of action."

The assignee is not a receiver, and in the allowance of claims and marshalling of assets he is bound by the terms of the assignment. *Matter of Hevenor*, 144 N. Y. 271, 273. *People v. St. Nicholas Bank of New York*, 151 N. Y. 592, 594, 595.

It was optional with the plaintiff whether he would become a party, but, upon acceptance, he agreed to participate in the distribution of the property appropriated for the benefit of creditors upon the conditions designated by the assignor. *Andrews v. Tuttle-Smith Co.* 191 Mass. 461, and cases cited. And no provisions are found similar to those contained in the assignment construed in *Cotting v. Hooper, Lewis & Co. Inc.* 220 Mass. 273, 275, requiring that the net proceeds should be distributed substantially in conformity with the "bankruptcy acts of the United States," and consequently the private debts and liabilities of the assignor were limited strictly to debts and liabilities recognized in bankruptcy proceedings, or in *Shaw v. United Shoe Machinery Co.* 220 Mass. 486, where proof of debts due from the assignor were regulated by R. L. c. 163, § 31, relating to insolvent debtors.

The single justice decided that shortly before the date of the



assignment the plaintiff made an entry upon the demised premises for the purpose of terminating the leases described in the third and fourth paragraphs of the bill. The leases thereupon having been terminated, the covenant of the lessee common to both leases "that in case of such termination . . . it will indemnify the Lessor against all loss of rent and other payments which he may incur by reason of such termination during the residue of the time . . . specified for the duration of the said term; or at the election of the Lessor the Lessee will upon such termination pay to the Lessor as damages such a sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named," matured and became enforceable.

The plaintiff however could not recover both indemnity and damages, but must elect the ground of liability on which he proposed to hold the lessee. *Cotting v. Hooper, Lewis & Co. Inc.* 220 Mass. 273, 276. By the express wording of the covenant, the "time of such termination" is made the point of departure, and the period ensuing is "the remainder of the said term," comprising seventy-three months. If indemnity is chosen, the lessee becomes liable for any loss resulting from a rental less than the rent reserved with other payments which the lessor may incur "by reason of such termination during the residue" of the term. It is a liability contingent upon events thereafter occurring, because the full amount which the lessee eventually must pay for the remainder of the term cannot be wholly ascertained until the period ends. *Edmands v. Rust & Richardson Drug Co.* 191 Mass. 123, 127. *Woodbury v. Sparrell Print,* 187 Mass. 426, 428. *Bowditch v. Raymond,* 146 Mass. 109. *Matter of Hevenor,* 144 N. Y. 271, 273.

If however the lessor elects to take damages, they are assessed as of the date of termination, and are measured by the difference between the rental value of the premises in the market for the remainder of the term "and the rent and other payments herein named."

The lessor therefore, if he desired to hold the lessee to the performance of the covenant, was required to choose between indemnity and damages. It is alleged in paragraph six of the bill, that at the date of entry the lessor did make such election and chose damages. But this allegation having been denied in the answer

and issue having been joined, the question of election was an issue of fact with the burden of proof resting on the plaintiff. *Stone v. St. Louis Stamping Co.* 155 Mass. 267, 270. *Young v. Hayes*, 212 Mass. 525. It is decided by the finding of the single justice, that on the day of termination the plaintiff by an oral agreement let a portion of the premises to the former lessee who continued in occupation. Besides, paragraph five further alleges that by the agreement, the plaintiff "in no way waived . . . or in any respect abrogated, the terms of . . . said leases, or either of them, and in no way waived or released any claim or claims he had, or might have against" the lessee "for or on account of said leases . . .," and whether the plaintiff by his conduct in letting a part of the premises waived his right to damages, also was a question of fact which has not been determined. *Boyd v. Hill*, 198 Mass. 477, 485, 486.

The assignee, relying on the principle stated in *Hatch v. White*, 22 Pick. 518, 524, "that where one is bound by a covenant or agreement, to perform any act on the happening of an event within the knowledge of one party and not of the other party, in such case the law excuses the performance of the act until the party claiming shall have given notice to the other party, of the happening of the event upon which the performance was to be made," urges that there could not be an election to claim damages instead of indemnity until a notice sufficient to advise the tenant of the plaintiff's decision has been given. While the entry of the plaintiff, as we have said, ended the term, and the termination of the tenancy and the exercise of the choice given by the covenant were intended to be concurrent, and the plaintiff's undisclosed purpose or intention could not do away with the necessity within a reasonable time of some notice or unmistakable overt act from which the lessor's decision might be known, it is alleged and has been found that on the day after the leaseholds terminated the oral agreement for partial occupancy by the former lessee was made. It must be assumed from this transaction that the lessee knew of the termination and that the covenant had become operative. The plaintiff also, by becoming a party to the assignment, thereby notified the assignee that he held or claimed to hold a provable claim or demand against the assignor who executed the assignment within seven days after the tenancy ceased, and no limitation of time within which debts and demands must be proved appears

in the assignment. It is sufficient if they are presented before the assignee closes the estate or declares a dividend.

We are of opinion that under the circumstances the plaintiff's election, if made, was sufficiently manifested by his becoming a party to the assignment and the specification of his claim could be subsequently submitted. The provability of the plaintiff's damages does not depend upon the statements in his equivocal proof of claim submitted to the assignee sixty-one months after termination, but upon the question whether he actually made choice of damages as alleged in the bill, and whether such choice, if made, has been waived.

The case accordingly must stand for further hearing in the county court. If it is found that the choice has been made, and no subsequent waiver is shown, the plaintiff notwithstanding the delay has a provable claim for damages which upon liquidation are to be treated as due and payable on the date of termination and constitute a claim or debt of the assignor in existence at the date of the assignment. *Mill Dam Foundery v. Hovey*, 21 Pick. 417, 455. *Bowen v. Hoxie*, 137 Mass. 527, 531. *Bent v. Hubbardston*, 138 Mass. 99, 100. *May v. Hammond*, 146 Mass. 439. *Woodbury v. Sparrell Print*, 187 Mass. 426, 428, 429, and cases cited. *Ginn v. Almy*, 212 Mass. 486, 494. *Chemical National Bank v. Hartford Deposit Co.* 161 U. S. 1. But if the plaintiff fails on this branch of the case, the proof is to be limited to the arrears of rent and other payments which accrued before the lessee assigned and which apparently are not in dispute.

*Decree accordingly.*

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TIMOTHY C. LEAHY, administrator, vs. STANDARD OIL  
COMPANY OF NEW YORK.

Hampshire. September 21, 1915. — May 31, 1916.

Present: RUGG, C. J., LORING, CROSBY, & PIERCE, JJ.

*Negligence*, Where act of third person intervenes, Dangerous substance, Contributory negligence. *Proximate Cause*. *Practice, Civil*, Judge's charge, Province of jury.

In an action for personal injuries due to the negligence of the defendant's servant in placing a dangerous substance where it was likely to cause injury, it

is no defence that the injuries also were due to the subsequent negligence of a third person.

One, who deposits a dangerous substance in a place where as a natural consequence injury ensues, is in no way excused from liability for the consequence of his wrongful act by the fact that the place of deposit was the land of a third person and not in his control.

An employee, who is injured by reason of an explosion of a dangerous substance negligently placed on the land of his employer by another person, in an action against such person for his injuries is not debarred from recovery by the fact that negligence on the part of his employer contributed to his injury.

In an action of tort for personal injuries, where the charge of the presiding judge contained a correct statement of the law applicable to the case and was deficient only, if at all, in not undertaking to define by illustration the circumstances under which an act of negligence is the cause of an injury, but where that objection to the charge was not brought to the attention of the judge at the trial, the objection is not open to the excepting party upon an exception to the portion of the charge in question on the ground that it does not state the law correctly.

In the action of tort mentioned above it was *said* that whether one thing was the cause of another is a question of fact on which little help can be given to a jury except by way of illustration.

TORT by the administrator of the estate of John O'Rourke for the death, and the conscious suffering preceding it, of the plaintiff's intestate alleged to have been caused on March 4, 1913, by an explosion of gas generated from gasoline negligently left by an employee of the defendant in a pit in a basement that afterwards was occupied by the plaintiff's employer as a part of the "Draper Garage" in Northampton. Writ dated July 18, 1913.

In the Superior Court the case first was tried before *King, J.* The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which were sustained in a decision reported in 220 Mass. 90.

In accordance with the rescript then issued the case was tried again before *Aiken, C. J.* The evidence at the former trial was described in the former opinion of this court and the evidence at the present trial so far as it differed from the evidence at the former trial is described in the present opinion.

Sullivan, referred to below, was the plaintiff's employer, and was the proprietor of the garage. Morton, referred to below, was an employee of the defendant who undertook to fill the gasoline tank of the garage, when the gasoline leaked into the cellar which then was being constructed for a new steam heating plant for the garage. The reason for the gasoline flowing into the cellar was Morton's failure to insert the funnel through which he was pouring the gaso-

line into the filler pipe or mouth of the gasoline tank of the garage, and in this way forty-five gallons of gasoline were spilled upon the cellar floor while five gallons went into the tank. Upon being told by one Dalton, a plumber's helper, that gasoline was flowing into the cellar, Morton took a broom, went down to the cellar and swept the gasoline into the pit, although warned that it was an improper way to dispose of it. Morton then went upstairs where he received a check from Sullivan in payment for the gasoline he had put into the tank, saying to Sullivan that he had forty-five gallons of gasoline to pay for himself, because he "did not put the funnel in the filler pipe." A week later the addition to the garage was turned over to Sullivan. A week or two weeks after that, O'Rourke, the plaintiff's intestate, entered Sullivan's employ. On an evening a little more than a month after the addition to the garage had been turned over to Sullivan, Sullivan left the garage between six and seven o'clock, leaving O'Rourke in charge to wash cars and to "fix up the fires." O'Rourke, needing some warm water to wash a car, went down stairs to the boiler room and drew off some water from the boiler and, noticing that the water in the boiler was too low, opened the feed valve that turned on the water to the boiler, but did not know how to shut it off and left the water running. Later in the evening Sullivan returned to the garage and O'Rourke told him this, whereupon Sullivan went down into the cellar and turned off the water that was running into the boiler. Finding that the boiler was too full, he opened the cock and let the surplus water in the boiler run off on the cellar floor. As he reached the top of the stairs after doing this, he met O'Rourke, who said he was going down to put on some coal for the night. For this purpose O'Rourke opened the door of the fire box, and the explosions occurred which caused the injuries that resulted in his suffering and death. The water had run into the pit and the gasoline in the pit, being lighter than the water, had risen to the surface and had flowed out of the pit over the floor, a vaporization of the gasoline ensued and, the vapor coming in contact with the fire, the explosions occurred.

At the close of the evidence the defendant asked the Chief Justice for thirty-one rulings, among which were the following:

"3. Upon all the evidence the injury to the plaintiff's intestate was not the direct consequence of the defendant's negligence and the verdict must be for the defendant."

"9. Upon all the evidence the court must find that it was the duty of the employer of the plaintiff's intestate to see that the premises were reasonably safe for his said employee to work in and that failure of the said employer to perform this duty and not the defendant's negligence was the proximate cause of the injury."

"29. Upon all the evidence in the case, the plaintiff is not entitled to recover and a verdict must be directed for the defendant."

The Chief Justice refused to make these rulings or any of the other rulings requested by the defendant except the twenty-fourth, which he gave as an instruction to the jury as follows: "24. There is no evidence that at the time of the explosion the defendant had any control or custody of the premises upon which the gasoline had been theretofore left by it."

In the charge of the judge were included the following portions:

"If it is your conclusion there was carelessness on the part of Morton in the way he adjusted that tunnel in his purpose to fill the tank with gasoline or put gasoline into the tank, then you come to a still further consideration that is essential in order to create liability. The mere carelessness of misplacing the tunnel would not, of itself, create liability.

"It is not in dispute that the gasoline ran into the cellar. As to the manner it got there, you will be guided and aided by the evidence in the case. We reach the next consideration. It is not in dispute, as I understand it, that it was swept into the pit. Now, gentlemen, we have got to the vital point in the case. If that gasoline in the pit was there under such circumstances that Morton knew, or that Morton ought to know, that it was a probable source of danger, then there is responsibility for it. It must be established by the evidence in the case, and here comes in the feature in which I have said that jurors have the right to draw reasonable inferences from what appears, that Morton, when the gasoline was in the pit, appreciated or ought to have appreciated that, placed where it was, it was a likely source of danger, that there was a reasonable probability that harm might come from it. Now, as gasoline, in the aspects that are presented in this case, works its injuries when ignited or when its gases explode, we can get closer. There must have been an appreciation or realization on Morton's part that the gasoline in the pit was a source of danger, or, if he did not actually

appreciate it, it must be established that he ought, as a reasonably prudent man to have appreciated it."

"Gasoline was spilled on the twenty-fifth of January. Five weeks and a half elapsed, before the explosion. I come now to the conduct of Sullivan, and I say to you that if Sullivan knew that there was gasoline in the pit, or had reasonable cause to know it, and if Sullivan, in flooding the cellar, did an act that was an imprudent act, knowing that there was gasoline there and appreciating that the gasoline would float upon the surface of the water and would be distributed about the cellar if the pit was overflowed, if, viewing Sullivan's conduct, you say that Sullivan did not act in the prudent manner that he should have acted and is, therefore, to blame for the accident, by reason of putting the gasoline into such a position that the gasoline or its vapors ignited and exploded, if Sullivan was negligent, he might also be responsible legally for the damages resulting from the accident and could have been joined in this action or could have been separately sued for the consequences, if he was to blame by reason of acting imprudently or carelessly. But I instruct you further that if the conditions existed that I have laid down as essential to create liability on the part of the defendant company existed, namely, a realization on the part of Morton that he had done an act that was liable and probable to cause injury, and appreciated that it was liable to cause injury, or should have appreciated that it was liable to cause injury, the defendant is responsible for the consequences, although there was subsequently, on the part of Sullivan, negligent conduct which caused the explosion and without which there would have come no harm to O'Rourke. I say to you, gentlemen of the jury, repeating with more brevity and very likely with greater clearness, that although it may be your conclusion that Sullivan was to blame, was negligent, there is, nevertheless, responsibility on the part of the defendant company, if, on your conclusion on the evidence in the case, Morton appreciated, or ought to have appreciated in disposing of the gasoline as he did that he was doing an act that would probably cause injury that was reasonably likely to result injuriously."

"The defendant is not absolved from responsibility, although there was negligence on the part of Sullivan which contributed to the explosion, and provided the appreciation on the part of Morton

existed that he was doing a dangerous act, or there was an appreciation, or there ought to have been an appreciation, that it was a dangerous act.

"I want you to understand, gentlemen of the jury, that the recovery of damages against one person for an injury is a bar to the recovery against any one else, provided the damages are satisfied by payment. If there is a right to bring action, if there is contributive negligence by different persons that, by combination, results in an injury, there is the right to proceed against all who contributed by action to the result. There can be but one recovery. The recovery against any one of any number of participants in a wrongful act, and the satisfaction by payment of the damages awarded, is a bar against recovery against all others involved in it.

"I say to you, gentlemen of the jury, that the connection in the line of causation between the accident and the blame for it is sufficiently established if, upon the evidence in the case, you are satisfied that there was, on the part of Morton, an appreciation that he was doing a dangerous act in disposing of the gasoline as he did, or if there should have been an appreciation on his part in so disposing of it he was doing a dangerous act."

At the close of the charge, the defendant excepted "to that portion of the charge inconsistent with the defendant's requests in which the action of Sullivan is commented upon and the liability of the defendant in that relation, and to the rule as laid down by the court with respect to the liability of the defendant in the event of the act, the latter act, of Sullivan."

The jury returned a verdict for the plaintiff, assessing the damages on the first count, for causing death, in the sum of \$4,000 with interest from the date of the writ in the sum of \$454.40, and on the second count, for suffering preceding death, assessing damages in the sum of \$6,000 and adding as interest the sum of \$681.60. The defendant alleged exceptions.

*H. Parker*, for the defendant.

*J. C. Hammond & W. J. Reilley*, for the plaintiff.

LORING, J. The facts shown at the trial of this case consequent upon the decision in *Leahy v. Standard Oil Co. of New York*, 220 Mass. 90, were in the main the same as those which appeared in evidence when the case was first tried. There were, however, one



or two new matters in evidence at the second trial which should be stated. At the second trial it appeared that the cover of the pit was made of wood; and that there was an automatic pump to pump the contents of the pit to a washing stand in the old garage from which the contents "flowed out upon the open floor and into a manhole connecting with the sewer" of the city. The pipes of this pump went into the pit through holes in the wooden cover and the gasoline which was discharged by Morton on to the floor of the new boiler room found its way into the pit through these holes and through the edges of the wooden cover. This was possible because the pipes did not fully fill the holes in the wooden cover through which they entered the pit and the cover did not fit closely to the edges of the pit. This pump was not designed to pump the pit dry. When the liquid in the pit was reduced to a depth of seven inches the pump ceased to work. At the time that Sullivan ran the water out of the boiler there were or the jury were warranted in finding that there were about seven inches of gasoline in the pit and that this gasoline diluted with the water of the boiler ran out on the floor because the water of the boiler ran into the pit faster than the contents of the pit were pumped out by the pump. The gasoline and the water "overflowed the pit; it came out on the floor and covered it probably about quarter of an inch."

Sullivan, the owner of the garage, testified that when he was told by Morton of the spilling of the gasoline in the addition then under construction, he went to it and found the doors nailed and locked and was told by Dunn, the head plumber, that he "could not go down there." In addition he testified that "he did not then learn about any disposition of the gasoline." Sullivan further testified that "he knew that the State inspector had gone over it" (the addition) before he took possession on the first of February; that when he took possession on the first of February "there was no evidence of gasoline in the cellar" and the fires were going in the boiler; that "he went to the cellar on the first or second of February with Mr. Riley, the plumber." And that he did not know that the gasoline had been swept into the pit until the morning after the explosion.

Brandle, the owner of the addition, testified that the plumber told him that the gasoline which had been spilled in the addition had been cleaned up; that he was told that "the windows were

open . . . and it was all safe;" that the plumbers had told him that "it [the gasoline] was all cleaned up."

An expert testified that the gasoline in the pit could be made into a dangerous vapor by "its being heated" as well as by its dilution by water flowing into the pit and, if the cover was off, by a current of air caused for example "by a person walking to and fro."

At the close of the evidence the defendant asked the presiding judge to make thirty-one rulings of law, of which one was given and thirty were refused. In addition to taking an exception to the refusal to give the rulings asked for, the defendant excepted to "the rule as laid down by the court with respect to the liability of the defendant in the event of the act, the latter act, of Sullivan."

It is not necessary to decide what the rule of law is which would have governed this case if the jury had found Sullivan's intervening act to have been an innocent one. If for example, Sullivan neither knew nor ought to have known of the presence of the gasoline in the pit, his act of emptying the boiler by running out the water on to the cellar floor would not have been a negligent act. The intervening act of a third person "is important not *qua* cause, but *qua* wrongdoer." An innocent intervening act of a third person stands "on no different footing from the force of gravitation" for example, as Holmes, J., said in another connection in *Hayes v. Hyde Park*, 153 Mass. 514, 516. But it was pointed out in that opinion that there was no question of remoteness in that case.

The ruling complained of in the case at bar dealt with the rule of law governing this case if the jury found that Sullivan's act was a negligent act.

When this case was here before (*Leahy v. Standard Oil Co. of New York*, 220 Mass. 90), it was decided that the rule acted upon in *Burke v. Hodge*, 217 Mass. 182, was the rule applicable here if Sullivan's act was a negligent one. The learned counsel for the defendant has contended that the rule which governs this case in the event that Sullivan's act was a negligent one is that laid down in *Lane v. Atlantic Works*, 111 Mass. 136, and under that rule no case for the jury was made out here. The short answer to that contention is that the rule acted upon in *Burke v. Hodge* is quite different from that laid down in *Lane v. Atlantic Works*, and that it was decided when the case was here before that the rule of *Burke v. Hodge* was the rule governing this case.

In a case where there is an intervening negligent act of a third person we have a case where "There is more obscurity than there ought to be, perhaps, upon the limits of liability in general," as was said in *Glynn v. Central Railroad*, 175 Mass. 510, 511. We think it better to make a more full answer to the contention than the short one stated above.

Cases like *Lane v. Atlantic Works* are to be distinguished from cases like *Scott v. Shepherd*, Wm. Bl. 892, and *Ogden v. Aspinwall*, 220 Mass. 100, where the intervening act is an involuntary one. In cases like *Lane v. Atlantic Works* (where the occasion of the injury suffered by the plaintiff is an intervening wrongful act) the intervening act is an independent act of volition on the part of a third person. It is with an intervening act of that kind that we have to deal with here.

The rule laid down in *Lane v. Atlantic Works* is stated in these terms: "In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

This rule has since then been acted upon in numerous cases. In the following cases it was held that a case for the jury had been made out under this rule. *Elmer v. Locke*, 135 Mass. 575. *Koplan v. Boston Gas Light Co.* 177 Mass. 15. *Murray v. Boston Ice Co.* 180 Mass. 165. *Turner v. Page*, 186 Mass. 600. *Oulighan v. Butler*, 189 Mass. 287. *Flynn v. Butler*, 189 Mass. 377. *Butler v. New England Structural Co.* 191 Mass. 397. *Ladd v. New York, New Haven, & Hartford Railroad*, 193 Mass. 359. *Toohy v. McLean*, 199 Mass. 466. *Mullen v. Zides*, 216 Mass. 202. *Sousa v. Irome*, 219 Mass. 273. *Norton v. Chandler & Co. Inc.* 221 Mass. 99.

The rule acted upon in *Burke v. Hodge* is stated in these terms:

"The instructions given to the jury required them, in order to answer the issue affirmatively, to find that this negligence of the defendants was the sole efficient cause of the accident. The judge said that the question was whether this was the real cause, the compelling cause, of the accident. He told the jury that the answer to the issue should be 'No,' if there was intervening negligence of McArthur Brothers without which the wall would not have fallen. And after his charge had been finished, when his attention was called to this matter, he further said to the jury: 'You must find that the wall fell because of the negligent mixing and [that] it would have fallen as and when it did if the braces, the forms, had not been removed.' This was too stringent a rule. It was enough for the plaintiffs to show that the falling of the wall was due to the combined effect of the negligence of the defendants in mixing the concrete and of that of McArthur Brothers in removing the forms. *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, 580, *et seq.* *Bagley v. Wonderland Co.* 205 Mass. 238, 245, 246. *D'Almeida v. Boston & Maine Railroad*, 209 Mass. 81, 87. *Hunt v. New York, New Haven, & Hartford Railroad*, 212 Mass. 102, 107, 108. *Brown v. Thayer*, 212 Mass. 392, 397. *Dickey v. Willis*, 215 Mass. 292, 293. The plaintiff was entitled to have the issue found in his favor and to hold the defendants, although the accident would not have happened without the negligence of McArthur Brothers, if it also appeared that it would not have happened but for the negligence of the defendants which has been stated and that each of these different acts of negligence was a proximate cause of the accident, in the sense that the accident was directly due to the combined effect of these two causes and not merely to the negligence of McArthur Brothers."

It must now be taken to be settled (at least in this Commonwealth) that the natural and probable consequences of the defendant's act are to be looked to in determining their character, see *Sponatski's Case*, 220 Mass. 526, 530, 531. But in cases of negligence for example, when the character of the defendant's act is determined, that is, when it is determined that the defendant's act was a negligent one, the question of causation, that is, the question whether the injury suffered by the plaintiff was in fact caused by the defendant's negligent act, is one not affected by what the natural and probable consequences of that act were. What was said by the

present Chief Justice in *Sponatski's Case*, *ubi supra*, pages 530, 531, is of general application. The question of causation is one and the same question no matter how the defendant's liability is made out. It is of no consequence whether the fact by reason of which the defendant is liable, is made out under the workmen's compensation act, under the act which makes a railroad liable if certain signals are not given (as in *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393), or under the rule governing common law actions of negligence. When it is established that the fact exists by reason of which the defendant is liable if the necessary relation of cause and effect is made out between that fact which makes the defendant liable and the injury suffered by the plaintiff, the question whether that relation of cause and effect did or did not exist is one and the same question.

The doctrine of *Lane v. Atlantic Works* may well rest on the proposition that the third person's intervening act is in the contemplation of the law the act of the defendant if it is the natural and probable consequence of the defendant's act. In that case it is in the eye of the law the defendant's act because in the eye of the law every man is taken to have contemplated the natural and probable consequences of his acts as was laid down by this court in another connection in the recent case of *Matthews v. Thompson*, 186 Mass. 14. To repeat, where the intervening act of the third person is a natural and probable consequence of the defendant's act the act of the third person is in the eye of the law the defendant's act. See for example *Commonwealth v. Hackett*, 2 Allen, 136; *Regina v. Halliday*, 61 L. T. (N. S.) 701; *Wise v. Dunning*, [1902] 1 K. B. 167; *Guille v. Swan*, 19 Johns. 381. For a collection of cases on intervening acts of third persons, see Beale, Cases on Legal Liability, 279-498.

The question whether the wrongful intervening act (in cases like *Lane v. Atlantic Works*) is or is not one of the natural and probable consequences of the defendant's negligent act may have an additional aspect which is or may be of importance in some of these cases. To make out negligence on the part of the defendant it is necessary for the plaintiff to prove that the natural and probable consequence of his acts is that harm of the same general character as that which came to the plaintiff would be likely to come from it to persons who stood in the same general relation to the defend-

ant as the plaintiff. Where the harm which has come to the plaintiff has come to him through the wrongful intervening act of a third person, the plaintiff may not come within the class of persons to whom the defendant was negligent (that is, with regard to whom he failed to exercise the care he owed to persons of the class in question) unless the wrongful intervening act through which the harm came to the plaintiff was a natural and probable consequence of the act of the defendant. There are traces in the opinion in *Stone v. Boston & Albany Railroad*, 171 Mass. 536, that this aspect of the matter was in the mind of the court in that case, see pages 539, 542. And this would seem to be the ground of decision in *McIntire v. Roberts*, 149 Mass. 450.

It was held in *Burke v. Hodge*, *ubi supra*, that liability on the part of a defendant who is negligent may be made out when there is an intervening wrongful act of a third person without recourse to the rule in *Lane v. Atlantic Works*. It has been said that ordinarily the law does not look back of the last wrongdoer. See for example *Glynn v. Central Railroad*, 175 Mass. 510, and cases there cited. But *Burke v. Hodge* is a case where it does. That is to say it was held in *Burke v. Hodge* that there may be cases where the first act of negligence is of such a character that it continues to be and is a cause of the injury suffered by the plaintiff although there is an intervening wrongful act of a third person. In that case it is a cause of the injury to the plaintiff concurrent with the wrongful intervening act of the third person.

There is no conflict between the rule of *Lane v. Atlantic Works* and that of *Burke v. Hodge*. But these two rules (both of which are sound) show that the liability of an original wrongdoer as matter of law can be made out in two different ways, where there has been an intervening wrongful act of a third person.

When the case was before the court before it was held that this was such a case. We see no reason for questioning the conclusion then reached. It follows that there was a case for the jury even if Sullivan's intervening act was a negligent one, and the refusal to give the third, ninth and twenty-ninth rulings asked for was right.

Without taking them up one by one it is enough to say that we have considered the other twenty-seven rulings asked for by the defendant but not given and find none which stated correctly the rule which governs the decision of this case.

We proceed to consider the contentions and cases relied upon by the defendant in his argument at the bar.

The defendant insists that *Denny v. New York Central Railroad*, 13 Gray, 481, *Tutein v. Hurley*, 98 Mass. 211, *Stone v. Boston & Albany Railroad*, 171 Mass. 536, *Horan v. Watertown*, 217 Mass. 185, *Glassey v. Worcester Consolidated Street Railway*, 185 Mass. 315, *Higgins v. Higgins*, 188 Mass. 113, and *Bellino v. Columbus Construction Co.* 188 Mass. 430, are decisive of the case at bar. We have already referred to *Stone v. Boston & Albany Railroad*. The ground of those decisions was that on the evidence in those cases as matter of law the jury were not warranted in finding that the defendant's negligent act was the cause of the injury suffered by the plaintiff. That is to say that the negligence of the defendant had reached and passed the vanishing point as a cause so far as the injury to the plaintiff was concerned. That was not true of Morton's negligence in the case at bar. The question of causation is a pure question of fact to be decided by the jury. But (as in case of other questions of fact) where there is no evidence justifying a finding that the defendant's negligent act caused the injury suffered by the plaintiff a question of law arises to be dealt with by the court.

The defendant cannot escape liability by suggesting that in the case at bar the dangerous article which he negligently deposited (if he was negligent in depositing it there) was deposited on land of a third person. *Coman v. Alles*, 198 Mass. 99, and *Moret v. Fuller Co.* 195 Mass. 118, have no application to the case at bar.

We are of opinion that the intestate was not by implication and imputation guilty of contributory negligence if Sullivan was negligent and what was said in *Shultz v. Old Colony Street Railway*, 193 Mass. 309, 315, does not apply.

The defendant's last contention is that the exception taken to the charge should be sustained. The charge in substance followed the rule laid down in *Burke v. Hodge* which had been decided was the rule governing this case if Sullivan's act was a negligent one. So far as it went the charge was correct. If it was deficient it was in not undertaking to define by illustration the circumstances under which an act of negligence is a cause of an accident. That objection to the charge was not brought to the attention of the presiding judge. If such an objection had been brought to his attention

he could have added to his charge. But no complaint of that kind was made at the time. The objections made by the defendant at the time were those set forth in the thirty-one rulings asked for by him, no one of which correctly stated the principle of law which governed the decision of this case.

The defendant complains that the presiding judge gave the jury no guide as to the rule which should govern them in passing upon the question whether Morton's negligence was a cause of the injury suffered by the plaintiff's intestate in spite of but concurrent with the intervening act of Sullivan. But that is an objection to the rule of *Burke v. Hodge*, rather than an objection to the charge of the presiding judge under that rule. Whether one thing was the cause of another is a question of fact on which little help can be given to a jury except by way of illustration. As we have already said this objection to the charge was not suggested to the presiding judge.

*Exceptions overruled.*

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WESTERN UNION TELEGRAPH COMPANY & another *vs.* CALVIN  
H. FOSTER & others.

PUBLIC SERVICE COMMISSIONERS *vs.* WESTERN UNION TELE-  
GRAPH COMPANY & another.

Suffolk. January 25, 1916. — June 19, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Telegraph Company. Ticker Service. Public Service Commission. Carrier,  
Of messages, Discrimination. Practice, Civil, Parties. Interstate Commerce.  
Constitutional Law.*

Under St. 1913, c. 784, § 2 c, the public service commission have power, by an order passed by them to that effect, to compel a telegraph company doing business in this Commonwealth to furnish to a person properly applying for them quotations of the sales upon the New York Stock Exchange by means of a ticker service on the same terms that such quotations are furnished by it to other persons, although in the contract between the New York Stock Exchange and the telegraph company under which the quotations are obtained by that company it is provided that such quotations shall not be furnished to any subscriber unless "the subscriber shall have been approved by the exchange" and the person in question was not approved by the exchange as a subscriber.

In a proceeding under St. 1913, c. 784, § 28, by the public service commissioners to



enforce the order of the commission above described it is not necessary that the New York Stock Exchange or its officers and members should be made parties, as, whatever their interest in the subject matter may be, the proceeding deals only with the rights acquired by the telegraph company in the quotations.

In the decision stated above it was *pointed out* that the contract between the New York Stock Exchange and the telegraph company which was in force when the order of the public service commission was issued was made when St. 1913, c. 784, was in effect.

Although the sending of stock quotations by the New York Stock Exchange to a telegraph company at its place of business in Boston is interstate commerce, yet the furnishing of such quotations by the telegraph company to its customers or patrons in its ticker service at their Boston offices is domestic business and is analogous to selling at retail in the local market a commodity purchased at wholesale outside the Commonwealth. Consequently the federal interstate commerce act does not apply to such ticker service and it is subject to the law of this Commonwealth.

TWO PETITIONS, the first filed in the Supreme Judicial Court on September 27, 1915, under St. 1913, c. 784, § 27, praying that an order made by the public service commission on September 7, 1915, might be reviewed, annulled, modified or amended, the order referred to being as follows:

"It appearing that the Gold and Stock Telegraph Company, by the Western Union Telegraph Company, lessee, and the United Telegram Company have without just cause denied, and refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service now furnished and supplied to others, said denial of service is held to constitute an unjust and unlawful discrimination, and it is

"Ordered, That the Gold and Stock Telegraph Company, by The Western Union Telegraph Company, lessee, and The United Telegram Company shall forthwith remove said discrimination;"

And the second petition filed in the same court on October 15, 1915, under § 28, of the same statute by the public service commissioners against the Western Union Telegraph Company, a corporation organized under the laws of the State of New York and having a usual place of business in the Commonwealth, and the United Telegram Company, a corporation organized under the laws of the State of New Jersey and having a usual place of business in the Commonwealth, praying for a mandatory injunction ordering the respondents to comply with the order quoted above.

The cases were consolidated by an order of the court and there-

after came on to be heard by *Pierce, J.* Whereupon, no issue of fact being raised by the pleadings and no evidence being offered by either party, all questions of law involved were reserved by the justice upon the pleadings for determination by the full court.

*A. Lord & R. Taggart* (of New York), for the Western Union Telegraph Company and the United Telegram Company.

*H. W. Barnum*, Assistant Attorney General, for the public service commission.

*P. H. Kelley*, (*J. L. McLean* with him,) for the respondent Foster.

*H. S. Robbins* (of Illinois), for the Chicago Board of Trade, by permission of the court submitted a brief.

*W. F. Taylor* (of New York), for the New York Stock Exchange, by permission of the court submitted a brief.

*Rugg, C. J.* These cases arise under St. 1913, c. 784. In substance the petition by the Western Union Telegraph Company and the United Telegram Company seeks a review and annulment of an order of the public service commission, while the public service commission by its petition seeks enforcement of such order. This order is designed to prevent unfair and unjust discrimination by the telegraph companies. The statute confers upon the public service commission ample powers to that end. It also clothes the Supreme Judicial Court with jurisdiction to review, modify, or amend unlawful rulings and orders of the commissioners and to enforce its valid orders. §§ 2, 20, 27, 28.

The material facts are that the telegraph companies are furnishing to brokers and others in Boston continuous ticker quotations of transactions upon the New York Stock Exchange, which they are enabled to do by means of contracts between the telegraph companies and the New York Stock Exchange. The stock exchange is a voluntary association with its place of business in New York. Quotations of sales of stock on the New York Stock Exchange are collected by employees of the exchange, and, for a substantial consideration, furnished to each of the telegraph companies in New York under contracts which permit them to "furnish said quotations, or any part thereof, or any information therein contained, to its patrons by means of tickers, or by telegraph or telephone wires and instruments . . . subject to the limitations, conditions and provisions hereinafter contained," one of which is that such quotations shall not be furnished "to any subscriber thereof unless the sub-

scriber shall have signed in duplicate an application therefor addressed to the Telegraph Company, and the subscriber shall have been approved by the Exchange," the intent of which is declared to be "only to prevent the unlawful or improper use of such quotations." The quotations are collected and delivered almost moment by moment as the sales occur during business hours on the stock exchange. The quotations as thus received in New York are transmitted as soon as may be by each of the telegraph companies to its Boston office. Each of the telegraph companies has a main office in Boston, where there are electrical appliances connected by a system of cables and wires under and across public ways with ticker instruments in the offices of its patrons. The quotations received from New York are delivered into the main Boston office in the Morse code over ordinary telegraph wires. Forthwith an employee operating a keyboard causes them to be written simultaneously by means of ticker instruments upon a tape of paper in the office of each patron, where they can easily be read. The result is that the quotations are reported on the ticker as the sales are made and within a brief time thereafter.

Foster applied to each company for this ticker service upon application forms prescribed by the contracts between the stock exchange and the telegraph companies, which were transmitted by each company to the stock exchange for its approval. The stock exchange did not approve the applications and the telegraph companies refused to install the ticker service. Foster thereupon applied to the public service commission to be furnished with the service. He alleged in his petition that he had been engaged for a long time in the stock brokerage business in Boston, had previously been furnished with tickers, which were removed in 1914; that he had applied for a renewal of the service, had appeared before the appropriate committee of the New York Stock Exchange on two different occasions where he had submitted himself to examination and answered all questions asked; that in conducting his business he always has complied with the laws of this Commonwealth, and does not desire the quotations and ticker service for any unlawful or improper purpose, but for use in his legitimate brokerage business, which will suffer irreparable injury if he is unable to procure it. These allegations were not denied before the commission and cannot be challenged seriously here. The com-

mission found that the petitioner was ready and willing to pay the price charged to other patrons of the telegraph companies for ticker service, and to comply with all reasonable rules and regulations, and that the telegraph companies simply had been notified that the exchange had disapproved the petitioner's applications, without stating any reason. The commission found that there was no evidence that the petitioner desired the quotations for unlawful or improper use, and that the telegraph companies were guilty of unjust and illegal discrimination in that, without just cause, they denied and refused to supply to Foster the quotations of the stock exchange by means of ticker service, and ordered the companies forthwith to remove such discrimination. The cases must proceed upon the footing that these findings of fact are true.

The quotations, when collected and tabulated by the exchange, constitute its private property. As such they are entitled to every protection afforded by law to any other private property. Like other property they may be kept by their owners to themselves, or sold or distributed to others, or made known to some and denied to others. Their communication to many different persons under contracts does not make them public and is not such a publication as destroys their character as property. Strangers may be restrained from wrongfully obtaining possession of the information, and wrongdoers will be prevented from intermeddling with it. These propositions are not now open to question. *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62.

The stock exchange has not undertaken to distribute this information itself. It does not deal immediately with those who receive it by means of the ticker service. It has no contractual relation direct or indirect with the users of ticker service. It does not send the quotation to such users. Under its contract it "agrees, at its own expense, to furnish to the Telegraph Company" the quotations. The telegraph company in turn is authorized to "furnish said quotations, or any part thereof, or any information therein contained, to its patrons by means of tickers," or otherwise. One significant feature of this arrangement is that it is made with a common carrier of intelligence, whose facilities for practically instantaneous transmission of the stock quotations throughout the country are of the best. Manifestly the use of the information most advantageous to the stock exchange is dependent upon its

swiftly coming to the knowledge of those likely to be customers of its members. It seems obvious that the reason for making such contracts with telegraph companies is founded chiefly on their facilities for immediate transmission of the quotations to different parts of the country, facilities possessed by these companies solely because they are performing a *quasi* public function as common carriers. The persons to whom quotations may be furnished are described in the contract between the stock exchange and each of the telegraph companies as "patrons" of the telegraph company. That is the exactly correct word to describe the relation contemplated by the contract between the telegraph company and the user of the ticker. The user of the ticker is a customer of the telegraph company. He is not the recipient of messages from the stock exchange nor its customer nor contractee. That is plain from the frame of the contract. The transaction constitutes in effect a kind of sale of the quotations from the stock exchange to the telegraph company. The stock exchange does not use the telegraph company as a means for selling its property to others. It makes a sale directly to the telegraph company. The stock exchange receives annually from the telegraph company a large sum of money for the delivery of the information. The sender of ordinary messages is not paid by the telegraph company for sending them. To treat that annual payment as on account of sending messages would constitute a gross preference of the stock exchange over the rest of the public sending telegraphic messages. Such an intent cannot be presumed. The amount of the payment to the stock exchange, so far as disclosed by the contract, bears no direct relation to the amount which the telegraph company may receive from its ticker service. Plainly it is not the ordinary case of one person sending messages to another by the telegraph for a tariff charge. In this connection the telegraph company is not acting wholly as a common carrier in the conventional sense. It is conducting the business of distributing information on its own account through facilities acquired and held by it because it is a common carrier, not for a fixed transportation charge, but for its own profit. Having paid a gross sum for the information, it proceeds to make whatever money it rightly may by disseminating that information at its own expense and through its own instrumentalities, to such customers as it may secure. It

has the right to subdivide the quotations and rearrange them, and to deliver them in whole or in part or in such combination as it chooses. That is one of the express terms of its contract. The affair becomes its venture and not primarily or in this aspect at all the venture of the stock exchange. The only limitations professed to be expressed by the contract upon the absolute right of the telegraph company to deal with the quotations as its own are those tending to prevent the destruction of their value by being taken surreptitiously or otherwise, none of which are here in question, and that no one shall be furnished a ticker without approval of the stock exchange, for the single purpose of preventing the illegal use of the information. It cannot be contended on this record that that is the real ground of the refusal by the stock exchange to approve the application of Foster. No evidence of consequence was offered before the commission on this ground. The privilege conferred upon the telegraph company and the rights acquired by it under the contract are not solely those of a common carrier or the ordinary transmitter of intelligence. They savor of those of a proprietor dealing with his own. It does not seem necessary to analyze more accurately the kind of transaction entered into between the stock exchange and the telegraph company. The latter acquired a kind of right in the quotations which has some of the incidents of property. *Illinois Commission Co. v. Cleveland Telegraph Co.* 56 C. C. A. 205. When the stock exchange parted with that right to such a person as a telegraph company, it subjected that right to the necessary characteristics and limitations which inevitably attach to rights belonging to such an owner. Whatever may be said as to the right of a *quasi* public corporation to acquire purely private property has no application to the facts here disclosed. The property acquired by the telegraph companies in the stock quotations has no value to them except as they use their public franchises, granted and exercised solely because of the public service they are organized to render, in sending these quotations to financial centres for distribution by sale to their patrons. They are able to secure patrons in the case at bar solely through the exercise of their public functions in and under the streets of Boston. Such property, destined to such use as are the quotations, is as subject to public regulation in its use as are its other public functions. The property right is merely incidental to the public service function.

Telegraph companies exercise a public employment and are bound to serve all the public without discrimination. They may impose proper rules to which their patrons must conform, but these regulations must apply alike to all. They are a kind of common carrier. *Primrose v. Western Union Telegraph Co.* 154 U. S. 1. *Pensacola Telegraph Co. v. Western Union Telegraph Co.* 96 U. S. 1. *Western Union Telegraph Co. v. Call Publishing Co.* 181 U. S. 92. *Marconi Wireless Telegraph Co. of America v. Commonwealth*, 218 Mass. 558, 568. *Cumberland Telephone & Telegraph Co. v. Kelly*, 87 C. C. A. 268. They are subject to regulation under legislative authority on the ground that they are impressed with a public character. They are enabled to use public ways in Boston for wires and conduits and underground cables and thus to carry on their business, including the ticker service, only because they carry on business of a public character which is to be exercised under public control. *Pierce v. Drew*, 136 Mass. 75. *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397, 399. See *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. When such corporations have acquired rights in the disposal of which the public are interested, they must deal with those rights in accordance with the requirements of public regulations. The rights which these telegraph companies have acquired in connection with the quotations are beyond those merely incident to the transmission of intelligence from one person to another. They involve the distribution and dissemination of information as to which it has assumed far greater duties than those of simple transmission, and as to which its facilities growing out of its public character must be used. In this respect the case at bar is strictly analogous to those where patentees of telephones have undertaken to lease instruments subject to a limitation inconsistent with the public duties of the lessee, or which disable the lessee from performing its full obligation to the public. Many such cases have arisen and it generally has been held that such limitations have been repugnant to the general purpose of the lease of telephones, which is to serve the public without discrimination or favor. *State v. Bell Telephone Co.* 23 Fed. Rep. 539. *Delaware & American Telegraph & Telephone Co. v. State*, 2 C. C. A. 1. *State v. Telephone Co.* 36 Ohio St. 296. *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.* 61 Vt. 241. *Chesapeake & Potomac Telephone Co. v.*

*Baltimore & Ohio Telegraph Co.* 66 Md. 399, 416. See *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 25 C. C. A. 267, 272; *Bement v. National Harrow Co.* 186 U. S. 70, 91; *Union Trust & Savings Bank v. Kinlock Long Distance Telephone Co.* 258 Ill. 202. See to the contrary, *American Rapid Telegraph Co. v. Connecticut Telephone Co.* 49 Conn. 352.

It is a necessary consequence that the property or quasi property rights acquired by the telegraph companies in the quotations under their contracts with the stock exchange are subject to regulation by public boards to the extent authorized by St. 1913, c. 784, and exercised by the order of the public service commission here under review.

It follows that the condition in the contracts between the telegraph companies and the stock exchange, whereby the attempt is made to limit the persons, among law abiding citizens, to whom the quotations may be delivered, cannot stand against regulation by a public authority to insure indiscriminate distribution.

There is nothing inconsistent with this conclusion in *Board of Trade of Chicago v. Christie Grain & Stock Co.* 198 U. S. 236, *Hunt v. New York Cotton Exchange*, 205 U. S. 322, and *Board of Trade of Chicago v. Cella Commission Co.* 76 C. C. A. 28. Those decisions protect the owners of quotations against theft. They involve no principle touching the regulation of service rendered by a telegraph company respecting information as to which it has assumed obligations and acquired rights such as those here disclosed.

There are numerous decisions, some by courts not of last resort, upon questions more or less similar to the one here presented. The result here reached is supported by the principle followed in *Smith v. Gold & Stock Telegraph Co.* 42 Hun, 454, *Friedman v. Gold & Stock Telegraph Co.* 32 Hun, 4, *Shepard v. Gold & Stock Telegraph Co.* 38 Hun, 338, *Western Union Telegraph Co. v. State*, 165 Ind. 492, 500, 501, *New York & Chicago Grain & Stock Exchange v. Board of Trade of Chicago*, 127 Ill. 153, and *Tucker v. Western Union Telegraph Co.* decided by the Supreme Court of Erie County, New York, in June, 1915, affirmed by Appellate Division in November, 1915, 156 N. Y. Supp. 1148, and is contrary to *Matter of Renville*, 46 App. Div. (N. Y.) 37, *Sterrett v. Philadelphia Local Telegraph Co.* 18 Weekly Notes of Cases, 77, and perhaps to



*T. Griffin & Co. v. Western Union Telegraph Co.* 8 Ohio Decisions Reprint, 572, *Cain v. Western Union Telegraph Co.* 10 Ohio Decisions Reprint, 72.

The jurisdiction of the public service commission extends to telegraph companies by the express terms of St. 1913, c. 784, § 2. The use of wires and conduits in and under the streets by the telegraph companies in the ticker service renders that kind of service subject to public regulation. It is the "transmission of intelligence within the Commonwealth by electricity," and "service" connected therewith as the word "service" is used in §§ 2, 10, 14, 17, 20, 22, 23 of the statute.

In this aspect of the case it is unimportant that the stock exchange is not a party to the proceedings. Whatever may be its interest in the subject matter, it is not a necessary party.\* These proceedings deal only with the rights acquired by the telegraph companies in the quotations. Cases like *Lawrence v. Smith*, 201 Mass. 214, and *Gregory v. Stetson*, 133 U. S. 579, 586, are not pertinent in this connection. The rights here in issue arise under an attempted legislative regulation of the conduct of a public service corporation, and hence cases like *Express Cases*, 117 U. S. 1, where that element was absent, are not apposite.

The contract between the stock exchange and the telegraph companies was made subsequent to the enactment of the statute.† Manifestly such a contract cannot be pleaded in bar to the valid exercise of the police power under that statute. Contracts, though enforceable when made, are not enforceable to override such an exercise of the police power. *Louisville & Nashville Railroad v. Mottley*, 219 U. S. 467, 480. *New York Central & Hudson River Railroad v. Gray*, 239 U. S. 583.

It seems to us to follow that the telegraph companies are not exonerated from complying with an otherwise lawful order of the public service commission by the terms of their several contracts with the stock exchange.

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\* Of course the stock exchange, being a voluntary unincorporated association, could not technically be made a party. It is unnecessary to explain at length how the interests of its members might be represented in a suit like the present. *Pickett v. Walsh*, 192 Mass. 572, 589, 590. *Wilkinson v. Stitt*, 175 Mass. 581, 584.

† The contract in force when the order was passed was dated July 1, 1914. St. 1913, c. 784, went into effect on July 1, 1913. See § 30 of that statute.

The transactions disclosed on this record as having been dealt with by the public service commission, in our opinion did not constitute interstate commerce. The sending of the quotations from New York to Boston over wires in the ordinary course of telegraphy manifestly was interstate commerce. But, as has been pointed out, the telegraph companies as to their ticker service sent no messages from New York to the individual ticker subscriber. The quotations as messages were sent by the Morse code from New York to the telegraph companies at their Boston offices. The quotations there were transferred by their own employees to instruments of a different character. By the ticker service the information was delivered to their patrons in Boston. The telegraph companies, in making this transmutation from the Morse code telegraphic message, by which the quotations came from New York to their Boston offices, to the plain English of the tape on the ticker service through their own instrumentalities and mechanical devices, and through their own servants in their Boston offices, were pursuing a course somewhat, although not precisely, analogous to breaking bulk of merchandise received by interstate commerce, putting it into smaller packages and delivering it in retail trade. The interstate transmission ended when the quotations reached the Boston offices of the telegraph companies.. The subsequent acts in delivering the information upon the tickers in the offices of their customers were new and independent transactions. It was in effect a sale at retail of the information which had been received by interstate commerce. In principle it is the same as if the telegraph companies had caused to be set up in type the information after it was received at their Boston offices and sent by a printed sheet to each of their patrons. It accomplishes the same result through the mechanism of the ticker. No messages have been received in New York directed to their patrons, who are subscribers to the ticker service. The telegraph companies have secured their patrons by their own efforts, and for consideration paid directly by the patrons to the telegraph companies and wholly retained by the latter to their own uses, delivery is made of the quotations to the patrons. That transaction, so far as touches compensation, is entirely between their patrons and the telegraph companies. No one else has any connection with that matter. The stock exchange has no concern with it.

The immunities and characteristics which inhere in an original package are not applicable to such transactions and afford no protection against State regulation of retail sales or distribution of imports. *Austin v. Tennessee*, 179 U. S. 343. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 240. The principle of sales in the original package of goods transported in interstate commerce is foreign to these facts. The nature of the business transacted by the telegraph companies is such that the information contained in the quotations has no value to hold and to keep. Its valuable quality is in practically instantaneous transmutation into articulate form and impartation to large numbers of purchasers. The power to regulate by the State does not depend at all upon the source from which the information is derived, but upon the means adopted for its distribution and communication through wires and conduits in the public streets of a domestic municipality.

These transactions are different in their nature from continuous transportation of merchandise in interstate commerce, notwithstanding change in bill of lading, interruption of transit, and the like, where the initial purpose to transport by interstate or foreign commerce and the movement of the merchandise in such transportation is not changed but continues unbroken from the beginning despite temporary suspension. Cases like *Texas & New Orleans Railroad v. Sabine Tram Co.* 227 U. S. 111, and *Illinois Central Railroad v. Railroad Commission of Louisiana*, 236 U. S. 157, 163, which illustrate that principle, are inapplicable to the facts in the case at bar.

It is not necessary to multiply citations to show the fulness and completeness of the control of Congress over interstate commerce. It is indisputable. *Minnesota Rate Cases*, 230 U. S. 352, 398-412. *Houston, East & West Texas Railway v. United States*, and *Texas & Pacific Railway v. United States*, 234 U. S. 342, 351. *Kirmeyer v. Kansas*, 236 U. S. 568. The binding authority of these and like decisions is implicitly recognized. They do not seem pertinent to the facts of this record. While no analogy between information and chattels can be perfect, the case at bar in principle is indistinguishable from a purchase of a quantity of like books by the telegraph companies in New York for a gross price for the lot, the transportation of these in interstate commerce to their Boston offices, where the original packages are opened and single books sold there to indi-

vidual customers, to whom they are delivered by messengers of the telegraph companies. The method of dealing with them after the interstate commerce is ended by delivery in bulk at the main offices is no part of interstate commerce. In this respect the case is like the cabs of the railroad employed solely in the local transportation of passengers who have come in interstate travel, which are subject to local regulation and are not a part of interstate commerce. *Pennsylvania Railroad v. Knight*, 192 U. S. 21. The ticker service under the circumstances here disclosed is "subject to the law of the State." *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 241.

The federal interstate commerce act does not appear to us to apply to the transactions here in question. U. S. St. of June 18, 1910. 36 U. S. Sts. at Large, c. 309, § 7. That act relates to the transmission of messages by telegraph in interstate commerce. So far as that act manifests a purpose to regulate the field over which Congress has paramount authority, the right of the State to exercise its police power in the same field ceases to exist, no matter whether the particular act of Congress covers it entirely or not. The police power of the State may be put forth as to a subject not prohibited to the States and within national jurisdiction only when by the silence of Congress the nation has left it open. But when Congress speaks, then it supersedes existing, and prevents future, legislation by the several States on that subject. *Commonwealth v. Boston & Maine Railroad*, 222 Mass. 206, 210. *Atchison, Topeka & Santa Fe Railway v. Harold*, 241 U. S. 206, 210. The act of Congress here in question does not cover the local delivery by the ticker service radiating from Boston offices, to patrons in that city of each of the telegraph companies, of information bought by the telegraph companies and received in interstate commerce, but delivered in intrastate commerce under the circumstances disclosed in the cases at bar. Therefore, cases like *Northern Pacific Railway v. Washington*, 222 U. S. 370, *Erie Railroad v. New York*, 233 U. S. 671, 681, *Port Richmond & Bergen Point Ferry Co. v. Hudson County*, 234 U. S. 317, 330, *Southern Railway v. Railroad Commission of Indiana*, 236 U. S. 439, 447, *Charleston & Western Carolina Railway v. Varnville Furniture Co.* 237 U. S. 597, *Western Union Telegraph Co. v. Bilisoly*, 116 Va. 562, have no application.

Great stress has been laid in argument upon the danger of the use of quotations by bucket shops. It has been urged that the only effective way, in view of the elusive methods pursued by those violators of the law, of preventing such abuse, is for the stock exchange to have and exercise the power absolutely and without review to approve or to disapprove the applicants for ticker service. The evils arising from that form of gambling need not be minimized. But the accomplishment of a laudable result does not justify the use of means condemned by a public board acting in accordance with a legislative enactment. The present case, however, upon the express finding of the public service commission, goes upon the footing that Foster is not subject to imputation in respect of a bucket shop.

In the view which we take of the case it becomes unnecessary to discuss or decide whether the order may be sustained also as affecting interstate commerce only incidentally and not imposing a direct burden upon it within the principle declared in numerous cases. See, for example, *Western Union Telegraph Co. v. James*, 162 U. S. 650; *Western Union Telegraph Co. v. Commercial Milling Co.* 218 U. S. 406, 416; *Vermilye v. Western Union Telegraph Co.* 207 Mass. 401; *Commonwealth v. Peoples Express Co.* 201 Mass. 564, 578; *Atlantic Coast Line Railroad v. Glenn*, 239 U. S. 388; *Illinois Central Railroad v. Mulberry Hill Coal Co.* 238 U. S. 275; *Pennsylvania Railroad v. Puritan Coal Mining Co.* 237 U. S. 121; *Missouri, Kansas & Texas Railway v. Harris*, 234 U. S. 412; *Missouri Pacific Railway v. Larabee Flour Mills*, 211 U. S. 612; *St. Louis, Iron Mountain & Southern Railway v. Arkansas*, 240 U. S. 518.

The petition of the telegraph companies is to be dismissed with costs. In the petition by the public service commissioners, a decree is to be entered enjoining the telegraph companies to comply with the order of the public service commission.

*So ordered.*

THOMAS M. REYNOLDS vs. MISSOURI, KANSAS AND TEXAS  
RAILWAY COMPANY & others.

Suffolk. January 24, 1916. — June 19, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Jurisdiction*, Over foreign corporation. *Corporation*, Foreign: place of business, service upon. *Equity Pleading and Practice*, Service on foreign corporation, Plea to jurisdiction, Motion to reopen hearing on plea, Waiver of plea. *Constitutional Law*. *Interstate Commerce*. *Waiver*.

Where a resident of this Commonwealth is the New England passenger agent of a railroad corporation organized under the laws of another State and is advertised as such agent by the corporation, is the person to whom others in the neighborhood of his place of business look for information as to travel and accommodations to be had on the corporation's railroad system, uses the corporation's frank for that business, receives money for transportation orders on the corporation's line and accounts for such money to the corporation, sells tickets for passenger transportation which are accepted as good without further countersigning or stamping, is striving constantly to direct travel from all of New England over the corporation's railroad system and takes up complaints in regard to service with executive officers of the corporation, a finding is warranted that the railroad corporation is engaged in business in as well as soliciting business in this Commonwealth, and under St. 1913, c. 257, such corporation may be served with process in the manner provided for service in actions against domestic corporations.

St. 1913, c. 257, providing that a foreign corporation "which is engaged in or soliciting business in this Commonwealth" may be served with process in the manner provided for service against domestic corporations is not made unconstitutional because it applies to corporations whose business transacted here is wholly interstate in its nature.

The validity of the provision of St. 1913, c. 257, making the effect of soliciting business by a foreign corporation in this Commonwealth the same as that of transacting business here, was not involved in the present case, where the foreign corporation rightly was found to be doing business in this Commonwealth.

After the close of a hearing in a suit in equity upon a plea to the jurisdiction of the court, a motion by the plaintiff to be permitted to introduce further evidence alleged to have been discovered since the hearing bearing on the issues raised by the plea was denied by the trial judge, and the plaintiff appealed from the order denying the motion. *Held*, that the motion was addressed to the discretion of the trial judge, and that his decision could not be revised.

A foreign corporation which in a suit in equity has filed a plea to the jurisdiction of the court, denying that it has been served with process lawfully, does not waive this plea by taking part in an argument upon the question of whether a preliminary injunction ought to issue, where in doing so it expressly asserts its insistence on its rights under the plea, and by permission of the trial judge merely

argues the question of the injunction in case the decision of the court should be against it on the question of jurisdiction.

In overruling in the present suit in equity a plea of a defendant foreign corporation to the jurisdiction of the court based on the alleged want of lawful service, the question, whether the court had jurisdiction of the subject matter of the suit, was not presented nor considered.

**BILL IN EQUITY**, filed in the Superior Court on September 3, 1915, against the Missouri, Kansas and Texas Railway Company, a corporation organized under the laws of the State of Kansas and alleged to have a usual place of business in Boston, the American Express Company, a joint stock association organized under the laws of the State of New York and having a usual place of business in Boston, and the Western Union Telegraph Company, a corporation organized under the laws of the State of New York and having a usual place of business in Boston, alleging that the plaintiff is the bearer and holder of two hundred and twenty-four promissory notes for the sum of \$1,000 each dated May 1, 1913, and payable on May 1, 1915, with interest at the rate of five per cent per annum made and issued by the defendant Missouri, Kansas and Texas Railway Company, that the defendant railway company has failed to pay the principal of such notes or any interest thereon since May 1, 1915, and owes the amount of such principal and accrued interest to the plaintiff, that each of the other defendants has a contract with the defendant railway company under which that defendant is entitled to and will from time to time be entitled to receive payments of money, also alleging that the defendant railway company owns, subject to pledge, certain stocks and bonds to the income of which it is entitled; and praying that such payments and income may be applied toward the payment of the debt of the defendant railway company to the plaintiff.

The defendant railway company filed a plea to the jurisdiction of the court, alleging "That it was incorporated under the laws of Kansas and has always been a resident of Kansas and was not at the commencement of this suit or at any time afterwards doing business in this State and did not at any of the said times have in this State any place of business or any agent authorized to do any business on its behalf; that George E. Marsters, upon whom process was served in this suit as agent of this defendant, was not at the time of such service or at any other of the said times an agent of this defendant for any purpose which could make service upon

him binding upon this defendant. And this defendant submits that it was not at any of the said times and is not now subject to the jurisdiction of this court and that the service of process as aforesaid was not due process of law against this defendant according to either the Constitution of this Commonwealth or the Constitution of the United States."

The plaintiff filed the following special replication: "And for further replication the plaintiff says that the defendant Missouri, Kansas and Texas Railway Company has waived its right to object to the jurisdiction of this court in this case and has submitted itself to such jurisdiction by appearing by counsel before the court on September 7, 1915, and again on September 10, 1915, and arguing against the issue of a preliminary injunction against it as prayed for in the bill on grounds other than those affecting jurisdiction, to wit, on the ground that the bill did not allege facts which, as a matter of substantive law, entitled the plaintiff to a preliminary injunction or to the final relief prayed for."

The defendant railway company filed a motion to strike out the above special replication. This motion was granted by *Wait, J.*, with leave to the plaintiff to move to strike out the plea to the jurisdiction.

The judge in granting the motion made a memorandum of his findings of fact as to waiver and stated in the memorandum that the counsel of the defendant railway company "made it plain that he relied on his objection to the jurisdiction, and with my permission submitted the other points only in case I should be against him on the question of jurisdiction and that he did not waive that question."

The plaintiff then filed a motion to strike out the plea to the jurisdiction, and after argument this motion was denied by *Wait, J.* The plaintiff appealed from the interlocutory order denying the motion to strike out the plea.

The case was heard by *Wait, J.*, upon the plea of the defendant railway company. The evidence was taken by a commissioner appointed under Equity Rule 35.

After the hearing upon the plea but before the judge's decision had been rendered, the plaintiff filed a motion for leave to introduce further testimony of facts alleged to have been discovered since the hearing. The judge denied the motion, and the plaintiff



appealed from the interlocutory order denying this motion to be permitted to introduce additional evidence bearing on the facts put in issue by the plea.

The judge made a memorandum of findings as described in the opinion, concluding as follows:

"Nevertheless, Mr. Marsters is held out by the defendant railway as an agent for it at Boston, and, in my opinion, he is doing the acts which St. 1913, c. 257,\* contemplates as constituting an engaging in or soliciting business in this Commonwealth by a foreign corporation.

"I, therefore, find said defendant is engaging in business within this Commonwealth; that Marsters is an agent upon whom a service can be made which gives the court jurisdiction of the defendant; that the service made was valid; and, so finding and ruling, the plea is overruled."

The judge, being of opinion that his order that the plea be overruled so affected the merits of the controversy that the matter ought before further proceedings in the Superior Court to be determined by this court, reported that question and also the appeals from his interlocutory orders for such determination.

*B. Corneau*, for the plaintiff.

*J. L. Thorndike*, (*F. V. Barstow* with him,) for the defendant Missouri, Kansas and Texas Railway Company.

RUGG, C. J. The question at issue in this case is the jurisdictional one, whether service of process has been made upon the defendant railway company, who hereafter will be referred to as the defendant.

The facts are these. The Missouri, Kansas and Texas Railway Company is a corporation organized under the laws of Kansas. Its lines of railroad are located in Missouri, Kansas, Oklahoma, Texas, and perhaps in other States, but none in Massachusetts. In 1912, it entered into an agreement whereby George E. Marsters, a resident within this Commonwealth, was to represent its railway system as New England passenger agent, with headquarters in Boston, his compensation to consist of a commission on all revenue derived from passenger tickets sold in the six New England States, but without expense to it for office rent, advertising or travelling expenses. Thereupon, it sent him stationery with this printing:

\* Printed in the footnote at the bottom of page 384.

"Missouri, Kansas & Texas Railway System. New England Passenger Agency, 248 Washington Street, Boston. W. S. St. George, Gen. Passenger Agent, St. Louis, Mo. Geo. E. Marsters, New England Passenger Agent." Notice of this appointment was sent out by the railway company, which advertised him generally as its New England passenger agent. He was consulted by its officials in regard to passenger business. He was furnished with a frank for telegraphing on railroad business. He sold tickets for and reserved seats and berths in cars of the Pullman Company running over the defendant's railroad system, and used his telegraph frank which he was authorized to use only on the business of the railway company in connection with these transactions, although he was agent for the Pullman Company. In a comparatively few instances he issued prepaid orders for the transportation of passengers beginning at some point on the defendant's railroad system, to be exchanged for a ticket to be delivered at the points indicated, to be honored by the railway company. A form of prepaid order was furnished him by the defendant for that purpose. The money received from this source was sent by Marsters directly to the defendant. Local ticket agents in Boston conferred with him whenever they wanted information respecting the defendant's railroad system, or when they wanted a communication sent to it about its business, and he transmitted such communications. In some instances complaints about transportation were presented to him, which he took up with the railway company. Marsters paid the rent of his place of business himself, and conducted there a large business in "Tickets and Tours" on his own account. He advertised upon his windows and walls the names of many railroads and steamship lines, including in a prominent place that of the defendant railway company. He does not have for sale at his office any tickets of the defendant railway company, but sells through his arrangement with other railroad companies tickets issued by such railroads, which contain coupons for passage to points on or over the system of the defendant. Tickets constantly are sold by Marsters and other persons within this State, to which are attached coupons entitling the traveller to transportation over the lines of the defendant railway company without further validation. It is his duty to influence travellers to use the system of the defendant railway company and to exert this influ-

ence throughout the New England States. He renders no accounts to the company except for the prepaid orders. He is paid his monthly percentage on New England sales. At the Washington Street place of business he is conducting his own business in some respects for the benefit of the defendant railway company. In conclusion the trial judge found that "Marsters is held out by the defendant railway as an agent for it at Boston and . . . is doing the acts which St. 1913, c. 257, contemplates as constituting an engaging in or soliciting business in this Commonwealth by a foreign corporation. I, therefore, find said defendant is engaging in business within this Commonwealth." Most of these facts have been found by the trial judge, but as only one witness testified, and apparently the trial judge did not distrust his testimony in any respect, we have treated his testimony as true and included in this statement a few facts not stated in the judge's findings, but shown by the testimony and supporting his conclusion. See *Lindsey v. Bird*, 193 Mass. 200; *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138.

The precise point to be decided is whether the defendant railway company was "engaged in or soliciting business in this Commonwealth" within the meaning of the pertinent statute.\* The question involved is a federal one upon which the decisions of the United States Supreme Court are controlling. That court has said that "each case of this kind must depend upon its own facts." *Washington-Virginia Railway v. Real Estate Trust Co.* 238 U. S. 185, 186. That court has not undertaken to formulate any general rule defining what transactions are essential to the doing of business in the sense which will render the one conducting it liable to service of process. It has gone no further than to say that as to corporations "the business must be such in character and extent as to warrant

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\* St. 1913, c. 257, amending St. 1907, c. 332, § 1, is as follows: "In an action against a foreign corporation having its principal or a usual place of business within this Commonwealth, or which is engaged in or soliciting business in this Commonwealth, permanently or temporarily, and with or without a usual place of business therein, service of the summons or writ may be made according to the provisions of section thirty-six of chapter one hundred and sixty-seven of the Revised Laws for service in actions against domestic corporations; and such service shall be of the same effect and validity as if made upon the commissioner of corporations."

the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served." *St. Louis Southwestern Railway v. Alexander*, 227 U. S. 218, 227. In that case the facts were that the name under which the defendant did business was on the door of an office in New York, together with the name of persons designated as a general freight and passenger agent and a travelling freight agent. Through one of these agents, before action was brought, the plaintiff had some negotiations and correspondence touching his claim and its settlement, which reached and were considered by the executive officers of the defendant. This was held to be the transaction of business in behalf of the defendant in such manner as to make it liable to the service of process in respect of that matter in New York.

The case at bar seems to us to fall within the principle and the facts of the *Alexander* case. Marsters confessedly was the New England passenger agent advertised by the defendant as such, to whom others in this neighborhood looked for information respecting travel and accommodations to be had upon the defendant's railway system. He used the defendant's telegraphic frank for that business. He received money for transportation orders on the defendant's line and accounted for such money to the defendant. He was also constantly striving to direct travel from all New England territory over the defendant's railroad system. He took up complaints as to service with executive officers of the defendant. While the case at bar possesses all the elements of doing business revealed in the *Alexander* record, there are present some factors lacking in that case. Tickets good over the defendant's railroad system, attached as coupons to other tickets, were sold not only by Marsters (although not in his capacity as agent for the defendant) but by others within this State. The amount of revenue derived from these sales is not stated. The selling of tickets for passenger transportation is an important source of income to a railroad. The selling of such tickets accepted as good without further countersigning or stamping can only be done by authority of the defendant. Possession of such authority indicates a kind of agency. The importance of this branch of the defendant's business depends somewhat upon its magnitude. But the inference seems fair from the general testimony of Marsters that it is considerable. The selling of tickets good over the lines of a foreign railway corporation by agents of

other corporations does not, standing alone, constitute the doing of business by the foreign corporation within the State of sale of the tickets. *Peterson v. Chicago, Rock Island & Pacific Railway*, 205 U. S. 364, 394. But, considered in connection with the other circumstances, it is entitled to some weight. All in all, Marsters performed a service which was regarded as important. Judged by the compensation paid to him, it was worth fifteen per cent of all the revenue coming from passenger tickets sold in New England for the defendant railroad system. Correspondence as to complaints, advice as to passenger business, and other activities are outside a simple solicitation of business. While many of these elements alone might be held not to be a doing of business, we think that, grouped in combination, they constitute a doing of business within the Commonwealth sufficient to subject it to the service of process. *International Harvester Co. v. Kentucky*, 234 U. S. 579.

The case at bar seems to us distinguishable from *Green v. Chicago, Burlington & Quincy Railway*, 205 U. S. 530. There the office was hired in Pennsylvania by the defendant, but the solicitation of business and the selling of prepaid orders entitling the holder when reaching Chicago to receive a ticket over the railroad of the defendant was all that was done in that State. There are absent all the other factors present in the case at bar, while payment of office rent is the only one not disclosed here and present there. *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.* 236 U. S. 723, and *Peterson v. Chicago, Rock Island & Pacific Railway*, 205 U. S. 364, 394, fall in the same class as the Green case, and are wanting in features found here which seem to throw the case at bar on the other side of the line. The mere solicitation of business by a foreign corporation without more commonly has been held not to be the doing of business within a State. *Berger v. Pennsylvania Railroad*, 27 R. I. 583. *Booz v. Texas & Pacific Railway*, 250 Ill. 376, 381. *Arrow Lumber & Shingle Co. v. Union Pacific Railroad*, 53 Wash. 629. These and other like cases generally have been decided in the absence of a State statute expressly providing that for purpose of services of process the solicitation of business shall constitute a doing of business. See, however, *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 442. It is not necessary in the present case to decide whether such a statute would be constitutional, for the reason that the facts show a doing of business

in the sense in which those words are used in *Goldey v. Morning News*, 156 U. S. 518, *Green v. Chicago, Burlington & Quincy Railway*, 205 U. S. 530, *St. Louis Southwestern Railway v. Alexander*, 227 U. S. 218, and other cases of the United States Supreme Court.

Therefore, we conclude that the finding of fact that the defendant railway company was doing business within the Commonwealth was right.

In its broader aspect the question is presented whether St. 1913, c. 257, is constitutional. The circumstance that the business transacted by the defendant was wholly interstate in its nature is of no consequence in this connection. *International Harvester Co. v. Kentucky*, 234 U. S. 579. It is not necessary to discuss how great may be the effect of a State statute declaring certain conduct by a foreign corporation to constitute the transaction of business which would not be held to constitute the transaction of business apart from the statute. It is enough to say that the facts in the case at bar plainly bring the defendant within the terms of the statute. The statute is constitutional as applied to these facts because in our opinion, as already stated, they constitute a doing of business within the rule of the *Alexander* case.

The service of process here was in accordance with the terms of the statute. It was made both upon Marsters as the agent and upon a stockholder of the defendant.

While service upon a stockholder or even upon a director of the defendant resident within the Commonwealth, in accordance with R. L. c. 167, § 36, standing alone might be disregarded if the corporation transacted no business within the State, *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, when it is found that the corporation is transacting business within the Commonwealth, then such a service made in accordance with a statute offends no constitutional provision and constitutes adequate service of process. *Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 407. *St. Louis Southwestern Railway v. Alexander*, 227 U. S. 218, 226.

The motion of the plaintiff to be allowed to offer additional evidence after the hearing had been closed, but before the rendition of a decision, was addressed to the discretion of the trial judge and cannot be revised. The denial of the motion and the appeal from it presents no question of law. *Briggs v. Adams*, 220 Mass. 262.

There has been no waiver of the plea to the jurisdiction which seasonably was filed by the railway company. The argument of the question whether a preliminary injunction ought to issue, was made with reservation of all rights under the plea to the jurisdiction. The argument was invited by the judge. He made a finding to the effect that counsel plainly relied on the jurisdictional point and did not waive it, and by permission argued other points only in case the court should be against him on the question of jurisdiction. This finding was right. The conduct of the defendant's attorney constituted no waiver of the plea to the jurisdiction and was far from being in substance a general appearance. In principle this branch of the case is indistinguishable from *O'Loughlin v. Bird*, 128 Mass. 600, *Lowrie v. Castle*, 198 Mass. 82, 90, *Cheshire National Bank v. Jaynes*, ante, 14, and cases there collected. The plaintiff's exceptions and appeal upon this point are without merit.

The question whether the cause of action set out in the plaintiff's bill is one which can be sued upon in this State because related to the business done here, is not presented on this report and is not considered. See *Simon v. Southern Railway*, 236 U. S. 115, 130.

The plaintiff's appeal from the interlocutory orders striking out part of the plaintiff's replication to the plea has not been argued and is treated as waived. It follows that the plaintiff's exceptions are overruled, the order overruling the defendant's plea to the jurisdiction is affirmed, and other interlocutory orders are affirmed.

*So ordered.*

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#### I. M. NELSON vs. IMPERIAL WATER PROOF COMPANY, LIMITED.

Suffolk. March 7, 1916. — June 19, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Witness*, Contradiction. *Agency*, Scope of authority. *Evidence*, Competency.

In an action of contract against a corporation, a witness, who had been employed by the defendant but no longer was in its employ, testified for the plaintiff before an auditor. After the hearing before the auditor this witness was taken back into the defendant's employ in a city in another State, and his deposition was taken in that State, no cross-interrogatories being filed by the plaintiff. At the trial in court, after this deposition had been read by the defendant, the plaintiff

was permitted, against the defendant's objection, to put in evidence certain portions of the witness's testimony before the auditor for the purpose of contradicting his testimony in the deposition. *Held*, that the fact that the witness had testified for the plaintiff before the auditor did not make him the plaintiff's witness at the trial before the jury, and that the portions of his testimony before the auditor properly were admitted in contradiction of his statements as a deponent.

In an action of contract to recover commissions and also damages for the breach of an alleged contract to employ the plaintiff as agent for the sale of the defendant's product and the taking of contracts for doing work with such product, where the plaintiff has testified that a certain agent of the defendant solicited him in behalf of the defendant to take such an agency and promised him the alleged commissions, and where this agent has testified as a witness for the defendant that the defendant's secretary simply had directed him to look up an agent for the sale of the product, but that he was not authorized to make any agreement to pay commissions on contracts, it is error for the presiding judge to exclude the testimony of the defendant's secretary offered by the defendant to show that the authority of the defendant's agent to engage an agent "was limited to an agency for selling the product."

CONTRACT to recover commissions and also damages for a breach of a contract, made partly orally and partly by letter in January or February, 1913, by the terms of which the plaintiff was to conduct an agency for the sale of the defendant's product and the taking of contracts for doing work with such product, a waterproofing compound to be used in connection with cement work on buildings within the New England States, "and was to receive on the sale of the product such amounts above a certain stipulated figure as it was billed to the plaintiff, and further, was to receive a commission of fifty per cent on the profits of all contracts within said territory." Writ dated June 5, 1914.

In the Superior Court the case was tried before *Lawton, J.* In the course of the trial a deposition of one Clark, taken in Chicago, was offered by the defendant. Clark had testified for the plaintiff before the auditor, whose report was in favor of the plaintiff in the sum of \$2,865.14, including interest, and had been put in evidence by the plaintiff. At the time of the hearing before the auditor Clark was not in the defendant's employ. After the hearing before the auditor "he had been taken back into the defendant's employ" in Chicago. The deposition was in the form of answers to interrogatories filed in court by the defendant and, among other things, Clark said that he had a talk with the plaintiff previous to the hearing before the auditor, in which the plaintiff had asked him to testify in his favor and had agreed to give



him one third of the verdict obtained. He also stated in the deposition that "the work was done in a workmanlike manner." One of the counts in the plaintiff's declaration alleged that the work on one of the jobs had not been done in a workmanlike manner, which caused a loss of profits.

The plaintiff was allowed, subject to an exception of the defendant, to introduce portions of the testimony of Clark before the auditor in contradiction of these statements of Clark made in his deposition. No cross-interrogatories had been filed to the interrogatories filed by the defendant for the purpose of taking Clark's deposition.

The jury returned a verdict for the plaintiff in the sum of \$5,408.33; and the defendant alleged exceptions to the admission of the above described portions of Clark's testimony before the auditor and to the exclusion by the judge of the testimony of one Davis tending to show the limits of one Cassingham's authority to employ an agent, which is described in the opinion.

*Lee M. Friedman*, for the defendant.

*J. E. Macy*, for the plaintiff.

BRALEY, J. The exceptions are confined to the admission and exclusion of evidence. The fact that Clark had testified as a witness for the plaintiff before the auditor did not make him the plaintiff's witness at the trial before the jury, and the defendant having subsequently taken his deposition he became its witness. The plaintiff accordingly was properly allowed in contradiction of Clark's statements as a deponent to introduce portions of his evidence given before the auditor.

It appears that the defendant is engaged in the manufacture of "a waterproofing compound to be used in connection with cement work on buildings," and the plaintiff contended that by a contract partly oral and partly by letter he was to act as agent for the sale of the product, and "the taking of contracts for doing work with said product" within the New England States, receiving as compensation on the sale of the product "such amounts above a certain stipulated figure as it was billed" to him with "a commission of fifty per cent . . . on the profits of all contracts within said territory." And, the defendant having failed in performance, the plaintiff sues to recover commissions earned, and damages for breach of the contract.

The plaintiff testified that one Cassingham, acting in the defendant's behalf, solicited him to take the agency, and the negotiations resulted in the contract described. The correspondence which thereupon followed between Cassingham and the company, and the plaintiff and the company, would warrant the jury in finding that, not only was Cassingham rightfully acting for it, but with knowledge of what he had done the defendant recognized the validity of the contract as including not only the sale of the product but payment of commissions. *Foster v. Rockwell*, 104 Mass. 167, 172. *Harrod v. McDaniels*, 126 Mass. 413, 415. But Cassingham, as a witness for the defendant, having testified that the defendant's secretary, one Davis, had only directed him to "look up an agent for the sale of their products in the New England States" and that he was not authorized "to make any arrangement or agreement with any one to pay commissions on contracts obtained," the defendant called Davis, who after testifying that a conversation had taken place defining Cassingham's powers, was then asked to state the conversation. The question was excluded, although the defendant's counsel stated that the "evidence was offered for the purpose of showing that Cassingham's authority to engage an agent was limited to an agency for selling the product."

The ruling was wrong. *Cohen v. Jackson*, 210 Mass. 328. *Harrigan v. Dodge*, 216 Mass. 461. The only issue as to liability was the measure of Cassingham's powers. While it was undisputed that he was authorized to engage the plaintiff to sell the product, yet he was not a general agent, and the question whether he had been authorized to promise a commission on the profits of the contracts was in controversy. The credibility of Cassingham as a witness, or of the proposed witness Davis, under the offer of proof, when viewed in the light of the correspondence previously referred to as well as the legitimate inferences of fact to be drawn from all the evidence, was for the jury under suitable instructions. If, however, they believed Cassingham's version of the conversation when the plaintiff was engaged, no commissions had been promised, and the evidence excluded was clearly admissible to show the scope of Cassingham's agency. *Coleman v. Lewis*, 183 Mass. 485. *Record v. Littlefield*, 218 Mass. 483, 486, and cases cited.

*Exceptions sustained.*

## HENRY W. SAFFORD vs. MARGARET V. SAFFORD.

Norfolk. March 6, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, &amp; PIERCE, JJ.

*Marriage and Divorce, Annulment of marriage.*

Where a young man eighteen years and nine months of age married a woman twenty-one years of age after he frequently had had sexual intercourse with her during a period of about five months, after he had known for at least three months that she was pregnant and after his parents had told him not to marry her "but to wait and that time would tell whether or not he was the father of" her child, he cannot maintain a libel under R. L. c. 151, § 11, to annul the marriage on proving that his wife was pregnant by another man two months before he met her for the first time and that she induced him to believe that he was the only man who ever had had intercourse with her and that he was responsible for her condition; because it is plain that after the warning from his parents he was content to rely without investigation on the representations of the woman that he married.

CROSBY, J. This is a libel brought in behalf of a minor by his next friend, his father, to annul his marriage with the libellee on the ground of fraud. R. L. c. 151, § 11. The case comes before this court upon a report made by a judge of the Superior Court \* who ruled that upon the evidence the libel could not be maintained, and ordered it dismissed.

The material facts are not in dispute. The parties were married on December 20, 1913. At that time the libellant was about eighteen years and nine months old and the libellee was twenty-one years old. At the date of the marriage, the libellee was pregnant with a child begotten by a man other than the libellant during the last week in May, 1913. The parties became acquainted about July 10, 1913, and four or five days afterwards the libellant had sexual intercourse with the libellee; and from that time until within a few days before February 8, 1914, when the libellee's child was born, they frequently had sexual intercourse with each other. The libellee several times falsely represented to the libellant that he was the only man who ever had intercourse with her and that he was responsible for her condition.

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\* Keating, J.

She threatened him that she would commit suicide unless he married her, and although all these representations were false he believed them to be true, and without attempting to ascertain whether such representations were true or false, entered into the contract of marriage with her. The libellant never had sexual intercourse with any woman before having intercourse with the libellee in July, 1913. It also appears from the report that "his parents told the libellant not to marry the libellee but to wait and that time would tell whether or not he was the father of the libellee's child, but he did not know at that time that the date of the child's birth and its physical condition at its birth would indicate when the child had been begotten, and these facts were not explained to him."

It is well settled in this Commonwealth that the unchastity of a woman before the execution of the contract of marriage is not an impediment to a valid marriage. In order to avoid the contract and justify a decree of nullity, the fraud and deception must relate to facts essential to the very existence of the marriage relation. *Reynolds v. Reynolds*, 3 Allen, 605. It also has been decided by this court that a contract of marriage will not be set aside upon an application by a husband upon the ground of fraud, where it appears that he relied solely upon statements of the libellee and took no steps to determine their truth or falsity. "If it appears that he had the means of ascertaining the falsity of the statements made to him, or that the nature of the transaction and the circumstances attending it were such as to put a reasonable person on inquiry, the presumption of deceit arising from proof of the fraud will be repelled and the party will be left to bear the consequences of his own want of due diligence and caution. A party cannot escape from obligations which he has voluntarily assumed, on the ground that he has been deceived and defrauded, if he neglects to avail himself of means of information within his reach, or if he places a blind or wilful confidence in representations which were not calculated to deceive a man of ordinary prudence and circumspection, for although he may have been in point of fact deceived and imposed upon, yet it is a consequence or result of his own folly or neglect." *Foss v. Foss*, 12 Allen, 26.

The application of the principles stated to the case at bar is decisive against the maintenance of the libel. The counsel for the

libellant contends that the record shows that the libellant, by reason of youth, inexperience and ignorance "of the laws of nature governing reproductive functions of the human species, particularly as to the normal period of gestation," was not "a reasonable person" or "a man of ordinary prudence and circumspection" in such matters or capable of the exercise of a proper and reasonable prudence and discretion within the rule as stated in *Foss v. Foss, supra*. We are unable to agree with this contention.

It appears that for a period of about five months before his marriage, the libellant frequently had sexual intercourse with the libellee and well knew her to be unchaste; he also was well aware of her condition of pregnancy for at least three months before they were married. While he was eighteen years and four months old when he first met the libellee in July, 1913, the marriage did not take place until December 20, 1913. When he first met her, he was a graduate of the Quincy High School, a swimming instructor, and associated with boys and girls of his own age, and so far as appears was possessed of the knowledge and intelligence of the average boy of his age.

In view of the undisputed facts as disclosed by the record, it seems plain that he is not entitled to a decree declaring the marriage void in the absence of evidence to show that he made any inquiry or investigation to ascertain the truth of her statement that he was the father of the child. The fact that he had full knowledge of her unchastity was sufficient to have put him on his guard and to have caused him to take some steps to ascertain the truth or falsity of the charge made by her concerning her condition. *Commonwealth v. Shaman*, 223 Mass. 62. *Crehore v. Crehore*, 97 Mass. 330. *Donovan v. Donovan*, 9 Allen, 140. *Foss v. Foss, supra*.

The decision in *Reynolds v. Reynolds, supra*, is expressly limited "to the precise case stated in the libel" and is clearly distinguishable from the case at bar. In that case the libellant did not learn of the pregnancy of the libellee by another man until after the marriage, and did not have intercourse with her before that date.

However immature and inexperienced the libellant may have been, the report shows that he was told by his parents not to marry the libellee "but to wait and that time would tell whether or not he was the father of the libellee's child." This warning from those whom he might well have trusted was unheeded, and

his neglect of it shows that with blind credulity and without investigation he was content to rely upon the libellee's representations, from the consequences of which the law gives him no remedy.

In accordance with the terms of the report, the entry must be

*Decree dismissing libel affirmed.*

*N. T. Merritt, Jr., for the libellant.*

*W. G. Todd, for the libellee.*

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EDWARD CERESOLA (afterwards by the administratrix of his estate) vs. JOSEPH F. PAUL COMPANY.

Suffolk. March 7, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Evidence, Remoteness, Competency.*

In an action for personal injuries sustained by the plaintiff's intestate by reason of one of the rungs of a ladder coming out or breaking at one end when the intestate was going up the ladder, evidence that ten months after the accident the intestate had "yellow-jaundice" and was taken to a hospital, where he died two days later, and that when he was taken to the hospital he said, in answer to a question from the doctor in attendance as to his habits, "that he drank daily twelve whiskeys and twelve beers and used one to two boxes of cigarettes a day," is not competent upon the issue of liability, there being no presumption that such excessive use of intoxicating liquor and tobacco existed as a habit at any certain previous point of time, and such excessive use ten months after the accident being incompetent to show that the intestate was drunk or under the influence of intoxicating liquor at the time of his injury.

In the same case there was evidence that when the plaintiff's intestate was injured by falling from the ladder he was taken to a hospital, that he left the hospital at the end of seven days, that a month later he told his brother that his back bothered him and that he was unable to work, that four months after his injury he told a former fellow workman that he was unable to do any work and had not done any since the time of the accident and that seven months after his injury he told another person that his back was not yet well. *Held*, that on the issue of damages the intestate's reply to the doctor in regard to the extent of his daily use of intoxicating liquor and tobacco was material and relevant as tending to show that the intestate's inability to labor was not attributable entirely to his fall from the ladder.

TORT by Edward Ceresola, and afterwards by the administratrix of his estate, to recover damages for personal injuries sustained

by him on May 1, 1912, when he was in the employ of the defendant, with a first count alleging a defect in the ways, works or machinery of the defendant, and a second count alleging that the plaintiff's intestate in the exercise of due care was using a ladder in the service of and in obedience to an order of the defendant and was thrown to the ground and severely injured owing to a rung of the ladder pulling out or breaking or parting from the stringer. Writ dated August 15, 1912.

In the Superior Court the case was tried before *King, J.*

The plaintiff offered evidence tending to prove that her intestate was a tallyman in the employ of the defendant, that about ten o'clock on the morning of the day of the accident he went on an elevator to a landing about thirty feet from the ground and tallied lumber which was being passed out to load on a team; that at twelve o'clock he ceased work when the place closed down for the noon hour; that on returning after his dinner he was sent by the man in charge of the place and work up a ladder to the place where he had been working during the forenoon, the elevator not being available at this time; that this ladder stood in an upright and almost perpendicular position, and that when the deceased, Ceresola, had gone up about thirty or thirty-five feet one of the rungs of the ladder came out or broke at one end or his foot slipped; that he reached to grasp the side of the ladder, missed it and fell to the ground; that he was picked up in a semi-conscious condition and removed in an ambulance to the Boston City Hospital where he remained for seven days; that he had not been on this ladder before for nearly a month; that the sides of the ladder were two and one half inch spruce with holes bored clear through for the rungs; that the rungs were all the same size, without any shoulders or anything to prevent them from running through during a dry spell, the ladder being exposed to the sun; that it was old and dilapidated; that on several previous occasions the rungs had been loose and that the man in charge of the work knew it.

The deceased, on leaving the hospital seven days after the injury, roomed on Falmouth Street opposite his sister and took his meals with her for a few weeks after the accident. About a month after the accident he met his brother on the street and complained that his back bothered him and that he was unable to do any work. One Pearson, called by the plaintiff, said that he had

known the deceased for several years and was a fellow employee at the time of the accident, that he was the first to reach the deceased when he fell from the ladder, that he met the deceased about Labor Day of 1912 and that the deceased told him that he was unable to do any work and had not done any since the time of the accident. The administratrix testified that the deceased called on her at Christmas time and complained that his back was not yet well. The plaintiff offered no evidence of the condition of the deceased after Christmas, but stated before the jury that she did not claim any damages for the death of the deceased nor claim that the accident had anything to do with his death.

The defendant introduced the record of the Boston City Hospital, which showed that the plaintiff arrived there in an ambulance in less than fifteen minutes from the time of the accident and that he remained there for seven days. The record was silent as to whether or not the plaintiff had taken any liquor at the time he arrived at the hospital, but contained the statement that his foot slipped and he fell thirty-five feet.

The defendant called one Flanagan for whom the plaintiff's intestate worked as a cook in October, 1912, for a week or two at a time. Flanagan said that the deceased did not complain about the injury nor the accident.

The defendant's evidence tended to show that the plaintiff's intestate was under the influence of liquor at half past nine o'clock or ten o'clock on the morning of the day of the accident. The plaintiff's evidence tended to show that he was sober at that time and also at the time he was hurt.

The defendant offered to show, by the testimony of a doctor in attendance at the Boston City Hospital, that on March 17, 1913, which was two days before the death of the intestate, the intestate said to the doctor, in answer to the question as to what were his habits, that he drank daily twelve whiskeys and twelve beers and used one to two boxes of cigarettes a day.

This evidence was offered both on the question of liability and on the question of damages. The judge ruled as follows: "On the question of liability I sustain the objection and refer particularly to the case of *Hamsy v. Mudarri*, 195 Mass. 418, and I save the rights of the defendant."

On March 17, 1913, the deceased was taken to the Boston City



Hospital "suffering from yellow-jaundice," and died on March 19, 1913.

The jury returned a verdict for the plaintiff in the sum of \$200; and the defendant alleged exceptions.

*C. S. Knowles*, for the defendant.

*P. J. Donaghue*, for the plaintiff.

PIERCE, J. The testimony that the plaintiff's intestate, ten months after his injury, in response to a question as to his habits said that he drank daily twelve whiskeys and twelve beers and used one to two boxes of cigarettes a day, properly was excluded on the issue of liability. It had no tendency to show that the intestate was drunk or under the influence of intoxicating liquor at the time of the accident. *Carr v. West End Street Railway*, 163 Mass. 360. *Edwards v. Worcester*, 172 Mass. 104. *Hamsy v. Mudarri*, 195 Mass. 418. There is no presumption that his daily abuse of the use of intoxicating liquor and tobacco existed as a habit at any certain previous point of time. *Hingham v. South Scituate*, 7 Gray, 229, 233. *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305, 307.

Nevertheless, we are of opinion that the evidence upon the issue of damage was material and relevant. It tended to show that the inability to labor of the intestate was not attributable entirely to the accident but in part was due and chargeable to voluntary and reprehensible self-inflicted physical harm.

In the opinion of a majority of the court, the new trial should be confined to the question of damages. St. 1913, c. 716.

*Exceptions sustained.*

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### ARNOLD SCOTT vs. DEDHAM WATER COMPANY.

Suffolk. March 7, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Contract, Construction. Water Company.*

A contract made by a water company to furnish water for use on a certain property at the same rate charged to the former owner of the property, which was a fixed sum for the year, and "that the rate would continue the same for the pres-

ent," means that the rate charged the former owner will be continued until changed by the company, and, after a notification from the company that the fixed rate thereafter will be treated as a minimum charge and that all water used in excess of a certain number of gallons will be charged for at meter rates, the water taker must pay according to the changed rate, and, if he refuses to do so, the company, under a right reserved by the regulations printed on its bills, may shut off the water for non-payment of water rates.

BRALEY, J. The plaintiff owns property for which the defendant, a public service corporation, furnished water, but a dispute having arisen over the rates, he was notified that unless payment was made of the amount claimed by the company the service would be discontinued. It is alleged, in the bill thereupon brought for permanent injunctive relief, that, if this is done, the plaintiff's estate will be greatly damaged and the health of members of his family impaired. The allegations of the first paragraph of the bill, admitted by the answer, are that when the plaintiff purchased the premises the company had been furnishing water to the former owner "at a flat rate of \$100 per year," and the second paragraph alleges that, at an interview between the plaintiff and the defendant's president, the president "promised that the rate would not be changed" and that it would continue at that rate yearly "payable in advance." The answer, while admitting the interview, avers that the president only promised that the rate would not be changed for the succeeding year.

The rights of the parties depend upon the terms of the parol contract into which they entered. *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556. *Turner v. Revere Water Co.* 171 Mass. 329. *Souther v. Gloucester*, 187 Mass. 552. It is to be ascertained from the evidence of the plaintiff and the president, who were the only witnesses present at the interview, with the burden of proof on the plaintiff to sustain the agreement described in the bill. While the evidence taken by a commissioner is reported, the credibility of the witnesses was for the presiding judge, whose findings of fact will not be reversed unless shown to be plainly wrong. If on the one hand the plaintiff's version is accepted, the defendant agreed to furnish water indefinitely at a flat rate, for the record fails to show any limitation on the authority of the president to bind the company. If on the other hand the president's statement that the rate was only "for the present" is correct, the rate continued only so long as either party chose to be bound. We have

read the evidence. It is, as we have said, contradictory, and the finding that the "plaintiff asked the president if the rate which had been charged the prior owner of the premises \$100 a year was to continue," to which the president replied, "I think we ought to get the same rate," and the "plaintiff said that that would be satisfactory to him, and thereupon the president said that the rate would continue the same for the present" must stand. The contract accordingly should be construed to mean, that the rate charged the former owner would be continued until changed by the company. The plaintiff paid for one year, when the defendant by the terms of the bill rendered for the succeeding year notified him that the flat rate was to be considered only as a minimum charge for the number of gallons therein specified and that thereafter all water used in excess would be charged for at "meter rates." The plaintiff did not deny receiving this and subsequent bills containing similar recitals. And, although unable to testify that he received the notice, yet the judge found on all the evidence, that, when the rates were changed and the service by meter adopted, the notice announcing the change was received by him in common with all users of water. If, after being informed that in the future the company would require payment at "meter rates" for water used in excess of the quantity supplied for the minimum price, he continued to receive and use a greater quantity, he impliedly agreed to pay for it at the established price. *Dickey v. Putnam Free School*, 197 Mass. 468, 473, and cases cited. The plaintiff having refused to permit the installation of a meter on his own premises, meters were placed in the adjoining highway, and it was admitted that water was properly measured, and the bills presented to the plaintiff corresponded with the amount registered.

But, the plaintiff having refused to make payment, the eighth clause of the regulations, also printed on the bills he received, that "The company reserves the right to shut off the water in all cases for nonpayment of water rates . . .," became applicable, and properly could be enforced by the defendant by discontinuance of the service. *Turner v. Revere Water Co.* 171 Mass. 329, 336, and cases cited.

The judge's \* computation of the amount due is not questioned,

\* *Jenney, J.* He found that at the time of the filing of the bill the plaintiff owed the defendant for water furnished by it to him the sum of \$412.69.

and, as he rightly held the plaintiff liable therefor, the interlocutory decree that unless this sum was paid the bill should be dismissed is affirmed. And, the plaintiff not having complied with this decree, the final decree dismissing the bill, from which he also appealed, should be affirmed.

*Ordered accordingly.*

*W. C. Cogswell*, for the plaintiff.

*W. H. Wade*, for the defendant.

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ABBIE F. NYE vs. LOUIS K. LIGGETT COMPANY.

Middlesex. March 8, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Negligence*, In a retail store, Contributory.

If the proprietor of a retail drug store maintaining a soda counter has placed an upright weighing machine so near the entrance of the store that its low base or platform is in the path of customers passing in and out and a woman turning from the soda counter to pass out of the store stumbles over the base of the weighing machine and is injured, in an action against the proprietor for her injuries thus caused it can be found that the defendant was negligent.

In an action by a woman against the proprietor of a retail drug store for personal injuries caused by the plaintiff stumbling over the base of a weighing machine when she had turned from a soda counter to pass out of the store, under St. 1914, c. 553, it is a question for the jury, with the burden of proof on the defendant, whether the presumption of the plaintiff's due care has been overcome by all the evidence.

TORT for personal injuries sustained by the plaintiff on March 4, 1915, in the retail drug store of the defendant numbered 474 on Washington Street in Boston by reason of falling over the low base or platform of an upright weighing machine alleged to have been placed negligently by the defendant in the path of customers without any guard to prevent injury to persons lawfully in the store. Writ dated April 16, 1915.

In the Superior Court the case was tried before *Bell, J.* The substance of the evidence is described in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. On all the evidence the plaintiff was not in the exercise of due care.

"3. If the jury believe that the plaintiff fell over the defendant's scales simply because she did not notice them, then the jury must find that the plaintiff was not in the exercise of due care.

"4. If the jury believe that the plaintiff fell over the defendant's scales simply because she did not notice them, then the jury must find that the plaintiff was not in the exercise of due care, provided the jury further believe that the scales were plainly visible to any visitor in the defendant's store, and that at the time the plaintiff fell there was ample light to enable any one to see them plainly.

"5. If the jury believe that the defendant maintained a retail drug store at the corner of Washington and Avon streets, Boston, having entrances on both streets and being approximately thirty feet broad and sixty feet deep, with the two street sides composed of practically continuous show windows or glass doors, said store being thereby amply lighted at all times during the day; and if the jury further believe that various counters, stands and other apparatus were placed throughout the store, and that among these was an upright weighing scale covering an area substantially two feet long by eighteen inches broad, and having a platform six or eight inches from the ground upon which to stand and an upright arm of about six feet high, standing plumb against the back of a show window and extending directly out therefrom parallel to and about two feet away from one end of a soda water fountain about thirty feet long; and if the jury further believe that in such a situation and in broad daylight, the plaintiff fell over said scales, then they must find that the plaintiff was not in the exercise of due care and that she is not entitled to recover.

"6. On all the evidence the defendant was not negligent in the maintenance of its premises.

"7. Provided the store is sufficiently lighted and there are no hidden traps, there is no duty upon the owner of a retail drug store to arrange his interior appliances in any particular manner for the convenience of his customers, and if one of such customers falls over one of such appliances, it is not sufficient to charge the

defendant with negligence, and the plaintiff is accordingly not entitled to recover.

"8. Provided the store is sufficiently lighted and there are no hidden traps, there is no duty upon the owner of a retail drug store to arrange his interior appliances in any particular manner for the convenience of his customers, and if one of such customers falls over one of such appliances, it is not sufficient to charge the defendant with negligence, and the plaintiff is accordingly not entitled to recover, even though the jury believe that some other arrangement of such appliances might, as a matter of fact, have been better adapted to the convenience and safety of the customers frequenting the store."

The judge refused to make these rulings and submitted to the jury three questions, which with the answers of the jury were as follows:

"1. Was or was not the defendant negligent toward the plaintiff with respect to the position of the weighing machine?" The jury answered, "Yes."

"2. Did or did not want of reasonable care on the part of the plaintiff contribute to the accident?" The jury answered, "No."

"3. What, if anything, would be a fair and just compensation to the plaintiff for the pain and suffering, past and future, caused by the accident, her loss of earnings and her expenses?" The jury answered, "\$3,500."

The judge reported the case for determination by this court. If this court should be of the opinion that upon all the evidence the plaintiff was as a matter of law not in the exercise of due care, or that there was no evidence of the defendant's negligence, judgment was to be entered for the defendant; if this court should be of the opinion that questions both of the plaintiff's due care and of the defendant's negligence properly might have been submitted to the jury, but that the judge erred in his admission of evidence excepted to by the defendant in the course of the trial, or in his refusal to give any of the defendant's requests for rulings, then the case was to be remanded for a new trial; if this court should be of the opinion that the case properly was submitted to the jury and that there was no error in the admission of testimony excepted to by the defendant, or in refusing to give the defend-

ant's requests for rulings, judgment was to be entered for the plaintiff in the sum of \$3,500.

The case was submitted on briefs.

*W. B. Luther*, for the defendant.

*O. C. Scales*, for the plaintiff.

BRALEY, J. The plaintiff was lawfully in the store, and while there the defendant owed her the duty to use ordinary care to keep the premises in a reasonably safe condition for her use as a customer. *Ginns v. C. T. Sherer Co.* 219 Mass. 18.

It sold soda, drugs and the articles usually dealt in by the proprietor of a retail drug store, and the jury could find from the evidence, which included the plan, that when viewed in connection with the volume of patronage as described by her the weighing machine, over which the plaintiff stumbled and fell as she turned from the soda counter to pass out of the store, had been placed too near the entrance to permit customers to make their exit safely, and that the defendant in the exercise of due care should have discovered this probable danger and removed the machine. While the case is close, we cannot say as matter of law that there was no evidence for the jury of the defendant's negligence. *Ginns v. C. T. Sherer Co.*, *supra*. *Bennett v. Jordan Marsh Co.* 216 Mass. 550.

It is further contended that the plaintiff was negligent. But under the St. of 1914, c. 553, this question was for the jury, who were to determine whether the presumption of her due care had been overcome by all the evidence, with the burden of proof on the defendant.

The exceptions to the admission of evidence having been waived, and the exceptions to the order of the court submitting certain questions to the jury not having been argued, we come to the exceptions to the refusal to give the defendant's requests. The first, second and sixth requests were denied rightly for reasons previously stated, while the fourth, fifth, seventh and eighth requests in so far as applicable were fully and accurately covered by the instructions. *Graham v. Middleby*, 185 Mass. 349. By the terms of the report the plaintiff is to have judgment for the amount stipulated.

*So ordered.*

## MARY A. SULLIVAN vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 13, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; CROSBY, JJ.

*Witness, Cross-examination. Evidence, Conflicting and correcting statements.*

Where, in an action against a corporation operating a street railway for personal injuries sustained when the plaintiff was a passenger on a car of the defendant, the plaintiff on her direct examination describes the manner in which she was injured, and in her cross-examination there are read to the witness her own answers to interrogatories, which give a different account of the way the accident happened, and she then testifies that her answers to the interrogatories give a correct and absolutely true description of the happening of the accident, notwithstanding anything that she has testified to on the witness stand, this is not to be treated as a mere instance of conflicting or inconsistent statements made upon cross-examination, and the plaintiff is to be bound by the statement last given as the truth.

Where an electric street railway car suddenly moves backward for a considerable distance just as passengers have entered it and then without a substantial interval of time moves forward, and where both motions are of such violence as to throw a passenger each time against some part of the car, this is so contrary to common experience in the ordinary operation of street railway cars as to warrant an inference of negligence in the operation of the car.

TORT for personal injuries sustained on October 9, 1913, when the plaintiff was a passenger on a semi-convertible street railway car of the defendant at about a quarter before nine o'clock in the evening on Cambridge Street in Cambridge between Sixth Street and Seventh Street. Writ dated November 14, 1913.

In the Superior Court the case was tried before *Dana, J.* At the close of the plaintiff's evidence, which is described in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*H. A. Wilson, F. Juggins & T. F. Murphy*, for the plaintiff, submitted a brief.

*F. J. Carney*, for the defendant.

RUGG, C. J. This is an action of tort to recover for personal injuries received by the plaintiff while a passenger on one of the defendant's prepayment cars. On direct examination, she testi-



fied that, as she was about to deposit her fare, after getting within the body of the car, it backed and then started forward; "then I got a grip . . . on the bar . . . and the car took a sudden lurch forward again and broke my grip on the bar and threw me . . . ." This testimony, singularly similar in crucial words to those used by this court in *Lacour v. Springfield Street Railway*, 200 Mass. 34, would have been enough to require a submission of the case to the jury. But on cross-examination this occurred: "Q. Well, here are the answers that are filed and you swore to them. 'The car came to a stop at the white post between Sixth and Seventh streets, and other people beside myself got on the car, some people got on ahead of me, and one or two got on behind me; I got into the car, and while I was standing in front of the money box and about to put my fare into the box the car gave a sudden jerk and backed up and threw me against the money box injuring my right arm. Then after the car had backed up about twice the width of the door it started with a sudden jerk again and went forward, and threw me against the wheel in the back of the car, and that worked the injury to my left hip and my head.' A. Yes. Q. Now that is a correct description of how your accident happened is it? A. Yes, sir; Q. And it is absolutely true? A. Yes, sir. Q. And notwithstanding anything which you testified to on the stand, you now say that what I have just read to you is an exact description of how your accident happened? A. Pretty near I guess. Q. It is true isn't it that that answer that you made in Mr. Murphy's office and which I have just read to you is absolutely true isn't it? A. Yes, sir, to the best of my knowledge."

Here is not an instance of more or less conflicting or inconsistent statements made in the course of an examination, where it is for the jury to say what the truth is, as in *Larson v. Boston Elevated Railway*, 212 Mass. 262, 268, and cases there collected and numerous similar cases. That is the general rule. A skillful cross-examiner, by pushing a witness to extremes and imposing upon a dull or wearied intellect, ought not to be permitted to secure an undue advantage. But there are occasions where a witness, having made two materially different statements touching the same event, finally adheres definitely to one in preference to the other as being the truth. Under such circumstances the witness is bound by the statement at last given as the truth. This case belongs to that

class. *Tupper v. Boston Elevated Railway*, 204 Mass. 151. *Ebert v. Haskell*, 217 Mass. 209, 212.

Even if that statement be taken as the utmost limit of evidence bearing on the negligence of the defendant's servants in charge and control of the car, there was still enough to make that question one of fact. There was other evidence that the plaintiff was thrown with force against the money box of the car as it backed and that "it seemed only a second when it lurched forward again." It has been decided in numerous cases that the ordinary lurches and jerks of a car, unaccompanied by evidence conveying a definite impression of specific physical facts, even though described with violent epithets, do not indicate negligence of those operating the car. See *Work v. Boston Elevated Railway*, 207 Mass. 447; *Martin v. Boston Elevated Railway*, 216 Mass. 361; *Foley v. Boston & Maine Railroad*, 193 Mass. 332; *Anderson v. Boston Elevated Railway*, 220 Mass. 28. That proposition is too well established to be open to discussion.

But it is not the ordinary course of operation for an electric car to go suddenly backward for a considerable distance just as passengers have entered it, and then without a substantial interval of time to go forward with such violence of action as to throw a passenger with each of these two motions against parts of the car. This diversity of opposite impetus of such force as to throw the ordinary passenger off his balance is so far contrary to common experience as to warrant an inference of negligence in management of the car.

*Exceptions sustained.*

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ELLEN M. ROLFE, administratrix *de bonis non*, vs. ELIZABETH CLARKE.

Middlesex. March 14, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Fraud*, As against creditors. *Equity Pleading and Practice*, Decree.

A deed was made by a married woman to her sister conveying certain real estate; which practically was all the property owned by the grantor. At the time the deed was made the grantor owed to a certain creditor about \$1,500 for services

rendered. The consideration for the deed was that the grantor and her husband should be supported as long as they or either of them lived by the grantee. There was no actual intent to defraud creditors, but the grantee as well as the grantor knew that the conveyance of the real estate would make the grantor insolvent and incapable of paying her debt to the creditor mentioned above. The grantor died, and the creditor mentioned above procured his own appointment as administrator *de bonis non* of the estate of the grantor and as such administrator brought a suit in equity against the grantee to obtain the satisfaction of his individual claim out of the real estate conveyed by the intestate to the defendant. *Held*, that, although the agreement of the defendant to support the grantor and her husband was a valuable consideration and the deed was good between the parties, the conveyance was fraudulent in law as against creditors and might be avoided by them.

Accordingly in the case described above it was ordered that, unless the defendant within a time limited should pay the individual claim of the plaintiff as a creditor and should pay also the expenses of administration and the costs of suit incurred by the plaintiff, the real estate should be sold under a license previously granted by the Probate Court and the proceeds applied to the satisfaction of the plaintiff's claim, any surplus being paid to the defendant.

In the case described above it appeared that the defendant, after the conveyance of the real estate to her, received from the net income produced by it a sum of money sufficient to repay her for all expenses incurred in the support of the grantor and her husband, so that it was not necessary to consider whether, if this had been otherwise, she would have been entitled to be reimbursed for such expenses out of the proceeds from the sale of the real estate.

CROSBY, J. This is a bill in equity brought by the administratrix *de bonis bon* of the estate of Maria J. Wiltbank, to set aside as fraudulent and void a deed of certain real estate made by the plaintiff's intestate to the defendant and dated February 17, 1911. The suit was heard by a judge of the Superior Court \* who made certain findings of fact, and a final decree has been entered in favor of the plaintiff from which the defendant appealed.

The real estate so conveyed was worth \$6,000 at the date of the deed and \$5,000 at the time of the hearing in 1915. At the time of the conveyance, the grantor owned no other property except certain personal estate which is found to be of the value of \$180. The real estate was conveyed subject to a mortgage thereon for \$250 and the inchoate right of curtesy of the grantor's husband. On the date of the conveyance the grantor owed the plaintiff individually for services rendered the sum of \$1,557, to recover which the plaintiff brought an action against the administratrix of the estate and recovered a judgment for \$1,657.16 including interest and costs, no part of which judgment has been paid.

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\* King, J.

When the conveyance was made and for some time previously, Mrs. Wiltbank had been suffering from a fatal disease from which she died on May 11, 1911. She was a sister of the defendant and, shortly after the date of the deed, went to live with Mrs. Clarke and remained there until her death. The judge found that "Mrs. Wiltbank's conveyance to her sister rendered her insolvent and unable to pay her then existing creditors, including Ellen M. Rolfe,"\* that "there was no actual intent upon the part of Mrs. Wiltbank, in making this conveyance to her sister, to hinder, delay or defraud her creditors, or any of them, unless such intent is to be conclusively presumed as matter of law from her acts in the premises," that "one of the purposes of the grantor . . . in making this conveyance, was to prevent her husband, in case he survived her, from becoming a statutory heir thereto, or of any share or interest therein. But I do not find that this was her sole purpose. Another purpose of the grantor in making this conveyance was to give her sister in this manner substantial evidence of her love and affection and to compensate her sister for the care . . . which she expected to receive."

The judge also found that the grantor hoped and expected her sister would support her (the grantor's) husband, but that there was no express agreement to that effect at or before the making of the conveyance; that after the conveyance the defendant cared for the grantor during the last illness of the latter and that such care "was rendered in part, if not wholly, gratuitously and from love and affection," and that the defendant paid to or on account of the grantor's surviving husband \$7 a week until his decease in May, 1914, that "she did this in consideration, in whole or in part, of the release by the husband of his right of curtesy in said real estate, and in accordance with an agreement between Mrs. Wiltbank and defendant after the conveyance here in question had been made."

The judge further found that the "defendant took said premises in entire good faith and without knowledge or notice of complainant's claim. . . . That the defendant should render to her sister such services and incur such expenses in her behalf, was one of the considerations of the conveyance in question."

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\* This was the individual claim of the plaintiff on which she obtained the judgment mentioned above.

The plaintiff contends that upon the findings made by the judge the sole consideration for the conveyance by Mrs. Wiltbank to her sister was founded upon love and affection and because of the feeling of gratitude of the grantor on account of the care and attention received by her during her last illness from Mrs. Clarke. There is much force in this contention, but in view of the findings above referred to and other findings made by the judge, and the evidence presented at the hearing, all of which is reported, we are of opinion that a part of the consideration for such conveyance was the expectation and understanding on the part of the grantor that she and her husband should be supported as long as they lived respectively by the defendant, and that there was therefore a good and valid consideration for the deed.

The question remains whether the conveyance, although given for a valuable consideration, was in fraud of the creditors of the plaintiff's intestate existing at the time when it was made.

The judge found that "At the time of taking said conveyance said Elizabeth Clarke knew in general the nature and extent of said Maria J. Wiltbank's property." This is equivalent to a finding that the grantee knew the real estate which she received was substantially all the property of which her sister was possessed, and that the conveyance rendered the grantor insolvent and unable to pay her then existing creditors including Ellen M. Rolfe.

While it is found that the defendant did not know of the debt due to the plaintiff individually when the deed was given, still it is a reasonable inference, in view of the close and intimate relation of the parties, including the fact that they were sisters, and all the circumstances as disclosed by the evidence, that the defendant knew of the indebtedness to others when she took title to substantially all the property her sister then owned. As was said by Knowlton, C. J., in *Matthews v. Thompson*, 186 Mass. 14, 23, "The question whether a conveyance was made with an intent to hinder, delay, defeat or defraud creditors, in this Commonwealth, is primarily a question of fact; but such facts as appear in this case are *prima facie* evidence of the intent, which, uncontrolled, call for a legal inference that the intent exists. The decision of the question in a case of this kind does not depend upon the existence or non-existence of moral turpitude on the part of the grantor; but upon an unjustifiable purpose to deprive

creditors of their legal rights. Nor is it important that this should be the primary, active, controlling purpose. It is enough if it is one of the purposes which was entertained, either directly or as incidental to a more active purpose. The presumption that one intends the natural consequences of his acts, under known conditions, is usually the controlling principle, in its application by courts and juries to such cases. . . . These facts were entirely uncontrolled by any other findings. They are evidence which, in law, points to a necessary conclusion as a legal inference, unless they are met by controlling facts. We are of opinion that they show a purpose and intention which were legally fraudulent, although they are not accompanied by moral turpitude, nor the desire or intention that the ultimate result should be harmful to the creditors."

We are of the opinion that, although such an agreement to support an insolvent grantor and her husband may be a valuable consideration, still it is not sufficient to uphold a conveyance as against prior creditors even if there was no actual intent to defraud.

In view of the finding that the defendant, since the conveyance to her, has received as net proceeds from the real estate so conveyed a sum sufficient to repay her for all expenses incurred in behalf of the grantor or her husband, we need not consider whether she would be entitled to be reimbursed for such expenses, although the deed be void as to creditors.

Without reciting the evidence, which is voluminous, we are of opinion that the findings were warranted and that they showed an intention of the grantor which was fraudulent in law, although there was no actual intent to defraud her creditors.

In *Gunn v. Butler*, 18 Pick. 248, there was evidence of the payment of an adequate pecuniary consideration apart from the promise to support the grantor. In that case Chief Justice Shaw used this language: "Still, however, as it purports to be made on a pecuniary consideration, and contains onerous stipulations on the part of the grantee, it cannot be said to be a voluntary conveyance, to be pronounced fraudulent against creditors as matter of law. But if it be true, as it is now stated, that no consideration was in fact paid, that it was a conveyance of the whole of the grantor's estate, that he was indebted at the time, and that the

conveyance had a tendency to defraud and defeat or hinder the creditors, a jury should be instructed, upon finding these facts, to find the deed fraudulent against creditors." *Slater v. Dudley*, 18 Pick. 373. *Pelham v. Aldrich*, 8 Gray, 515. *Rice v. Cunningham*, 116 Mass. 466. *Allen v. Allen*, 213 Mass. 29, 33. The conclusion which we have reached is in accordance with the principle stated in *Gunn v. Butler* and *Matthews v. Thompson*, *supra*, and is abundantly supported by decisions in many other jurisdictions. *Egery v. Johnson*, 70 Maine, 258. *Davidson v. Burke*, 143 Ill. 139, 146. *Robinson v. Stewart*, 10 N. Y. 189, 195. *Hawkins v. Moffitt*, 10 B. Mon. 81. *Walker v. Cady*, 106 Mich. 21. *Seekel v. Winch*, 108 Iowa, 102. *McCord v. Knowlton*, 79 Minn. 299. *Faber v. Matz*, 86 Wis. 370. *Long Branch Banking Co. v. Dennis*, 11 Dick. 549. *Woodall v. Kelly & Co.* 85 Ala. 368, 375.

While the deed is fraudulent and voidable as against existing creditors of the grantor, still it is valid as between the parties. The defendant's rights in the real estate in this proceeding are subject to the plaintiff's claim as a creditor of the estate of Maria J. Wiltbank; a decree could not properly be entered wholly setting aside the deed thereby causing the property to become assets of the estate. *Norton v. Norton*, 5 Cush. 524, 531. *Mallow v. Walker*, 115 Iowa, 238. *Wheeler v. Wallace*, 53 Mich. 364. *Byrd v. Hall*, 196 Fed. Rep. 762.

The defendant's rights in the property are subject only to the individual claim of the plaintiff, the expenses of administration, and costs of suit. *Norton v. Norton*, *supra*. *Chase v. Redding*, 13 Gray, 418. *Allen v. Ashley School Fund*, 102 Mass. 262, 266.

It follows that the decree must be reversed and a decree entered that the defendant pay the amount of the judgment and interest thereon due to the plaintiff individually, and produce evidence thereof or of a sufficient tender; also shall pay the expenses of administration and the costs of this suit, as a judge of the Superior Court may hereafter allow and approve. Then all further proceedings in this suit shall be stayed without further costs to either party, all such payments to be made within sixty days from the entry of this decree.

If the defendant fails to make such payments within the time limited, the plaintiff may sell the real estate in accordance with the terms of the license heretofore granted by the Probate Court;

and after deducting the expenses of administration, the costs of this suit and the amount of the judgment and interest thereon due the plaintiff individually, shall pay to the defendant any surplus that may remain.

*So ordered.*

*E. J. Flynn*, for the defendant.

*M. G. Rogers*, (*S. E. Qua* with him,) for the plaintiff.

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HAROLD R. KUSICK vs. THORNDIKE AND HIX, INCORPORATED.

Middlesex. March 15, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Negligence, Dangerous substance, Res ipsa loquitur. Lime.*

A canner who buys lime from a manufacturer of that substance, packs it in cans and sells the cans of lime to retail dealers, is not liable for an injury caused by the explosion of one of the cans of lime, when it was being opened by a customer who had purchased it from a retail dealer, in the absence of evidence that lime is a dangerous substance or that the canner of the lime was negligent as to the manner of packing or sealing it in the can, and also in the absence of evidence that, if there was anything defective or dangerous in the composition of the lime, the canner had any reason to know of it.

The fact that a person was injured by the explosion of a can of lime when it was being opened is not in itself evidence that the canner who packed the lime in the can and put it on the market did so negligently.

CROSBY, J. This is an action of tort to recover for personal injuries alleged to have been received by the plaintiff by reason of the explosion of a can of lime. There was evidence that the plaintiff was employed in a bowling alley in which one Hansis was employed as manager; that Hansis sent the plaintiff to the Central Square Hardware Company in Cambridge to buy a can of lime to be used in whitewashing some ceilings; that, after he had returned and Hansis was opening the can with a pocket knife, the lime exploded causing the injuries for which this action is brought.

There was also evidence from which it could have been found that the lime was manufactured by the Rockland Lime Company



and was sold by that company to the defendant, who packed it in a can and afterwards sold it to the Central Square Hardware Company.

In an action of this kind, it is well settled that it is necessary to aver and prove negligence in the defendant. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177. No negligence of the defendant in this case is shown unless the fact of the explosion be evidence of such negligence. No evidence was offered by the plaintiff to show that lime is an inherently dangerous article. On the other hand, the defendant offered evidence to the effect that it would be impossible for lime in cans, such as was put up by the defendant, to explode. While this evidence might have been disbelieved, still there was an entire absence of affirmative proof that the lime was dangerous in any degree. The distinction between the sale, without notice of its qualities, of an article commonly recognized as inherently dangerous to life or property, and the sale of ordinary merchandise and property, is well recognized. *Davidson v. Nichols*, 11 Allen, 514. *Boston & Albany Railroad v. Shanly*, 107 Mass. 568. *Lebourdais v. Vitrified Wheel Co.* 194 Mass. 341. The defendant was not the manufacturer of the lime but purchased it from the Rockland Lime Company. If there was anything defective or dangerous in its composition, there was no evidence to show how it came there or what it was. In the sale of such an article, in the absence of evidence that it is intrinsically dangerous, the seller cannot be charged with negligence unless it be shown that he knew or ought to have known of its unsafe and harmful qualities. *Lebourdais v. Vitrified Wheel Co.*, *supra*. *Thornhill v. Carpenter-Morton Co.* 220 Mass. 593.

In the absence of evidence of any false representations made by the defendant, the decision in *Roberts v. Anheuser Busch Brewing Association*, 211 Mass. 449, is not applicable. See also *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265.

This is not a case where the doctrine of *res ipsa loquitur* can be held to apply; while the cause of the explosion is unknown and unexplained, it could not be found that according to common experience it would not have happened without fault on the part of the defendant. There is no evidence whatever of any breach of duty on the part of the defendant. Although the explosion may be evidence of a defect of some kind, yet the cause is wholly con-

jectural, and there is nothing to show that it resulted from the fault of the defendant. As the defendant did not manufacture the lime, and as it does not appear that it knew or had any means of ascertaining whether it contained any substance of an explosive nature and not commonly present in lime, it cannot be charged with negligence because of the explosion. *Curtin v. Boston Elevated Railway*, 194 Mass. 260. *Chiuccariello v. Campbell*, 210 Mass. 532. *Carney v. Boston Elevated Railway*, 212 Mass. 179. *Conley v. United Drug Co.* 218 Mass. 238. *Sheehan v. Boston Elevated Railway*, 220 Mass. 210.

It follows that the ruling of the judge of the Superior Court \* that the plaintiff was not entitled to recover was right, and in accordance with the terms of the report, the entry must be

*Judgment for the defendant on the verdict.*

*W. H. Smart & T. F. Burns*, for the plaintiff, submitted a brief.  
*C. A. Parker*, for the defendant.

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RALPH M. HERRICK vs. ALBERT H. WAITT.

Middlesex. March 22, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Practice, Civil, Exceptions, New trial. Words, "I am content."*

At the close of the evidence at the trial of an action of tort the defendant's counsel made thirty-seven requests for instructions. The presiding judge stated that he should not read any of these requests to the jury, but should deliver his charge and then the defendant's counsel, if he desired to do so, might call the judge's attention to any instruction requested which he thought had not been given in substance. At the close of the charge the defendant's counsel again called attention to his requests and tried to take an exception to the refusal of all of them that were not given in the charge. The judge refused to allow an exception in that form, saying that he was entitled to have his attention called to anything requested as an instruction which the defendant thought that he had not given, and told the counsel to take his "own time about this." Thereupon the jury were seated, and the counsel went through his requests for instructions and, after doing so, said, "I am content." The jury returned a verdict for the plaintiff, and the judge allowed a bill of exceptions alleged by the defendant which stated the facts narrated above. *Held*, that by the words "I am content" the defendant's counsel stated to

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\* *White, J.*

the judge his satisfaction with the manner in which his requests had been dealt with, that therefore no exception was taken and the bill of exceptions should have been disallowed, and that the judge by his formal allowance of the bill of exceptions could not bring into existence, to affect the rights of the plaintiff, exceptions that never had been taken.

A number of months after a verdict had been returned for the plaintiff in an action of tort, the defendant filed a motion for a new trial on the ground of newly discovered evidence. From the affidavits in support of the motion it appeared that the testimony alleged to be new was that of two persons who had not been called as witnesses at the trial, but that the defendant and his witnesses had testified at the trial to what the affiants had told them, which was the same in substance as the contents of the affidavits. The trial judge denied the motion. *Held*, that the evidence was not newly discovered, and that there was nothing to show an abuse of discretion on the part of the judge in denying the motion for a new trial.

TORT for the alleged alienation of the affections of the plaintiff's wife. Writ dated October 10, 1913.

In the Superior Court the case was tried before *White, J.* The jury returned a verdict for the plaintiff in the sum of \$15,000; and the judge, under the circumstance narrated in the opinion, allowed a bill of exceptions alleged by the defendant.

*E. I. Smith, (C. W. Ford with him,)* for the defendant.

*J. F. Ryan,* for the plaintiff.

RUGG, C. J. At the conclusion of the evidence the defendant presented thirty-seven requests for instructions. The judge stated that he should not read them to the jury, but should deliver his charge and thereafter counsel might, if they desired, call his attention to any instructions which they thought had not been given in substance.

This was correct practice. While of course a judge may read the requests to the jury with such comment as may be necessary in order to state the law correctly, ordinarily it is better and more effective to give a comprehensive charge stating plainly and forcibly the law pertinent to the issues raised. The purpose of a charge is to enable the jury to understand their duty clearly and to be enlightened as to the principles of law by which their action must be controlled. It should be adapted as a whole to the presentation of those principles in words easily understood by the man of ordinary intelligence. This end usually can be accomplished more effectively by the judge formulating a complete and unified statement either wholly in his own words or partly by quotation from decided cases, with such reference to the evidence as may be wise

to render it practical as a guide to a just verdict, rather than by reading the detached expressions prepared as requests for instructions by counsel on one side or the other and liable to be colored by the necessary bias under which they are framed. *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, 502. *Maxwell v. Massachusetts Title Ins. Co.* 206 Mass. 197, 200. *Commonwealth v. Dow*, 217 Mass. 473, 483.

In the case at bar the counsel for the defendant properly made no objection to this procedure. At the close of the charge he referred again to his requests and excepted to the refusal of all of them not given in the charge. The judge refused to allow an exception in that form, saying that he was entitled to have his attention called to anything which counsel thought that he had not given, adding, "Now, take your own time about this." Thereupon the jury were seated and the counsel went through his requests for rulings and after doing so, said, "I am content."

This was not the taking of an exception. The colloquy means that, acting well within his right, the judge refused to allow the exception first stated. He might require any error in the charge or failure to cover every request to be pointed out to him so that it might be corrected. *Commonwealth v. Costley*, 118 Mass. 1, 22. *Henderson v. Raymond Syndicate*, 183 Mass. 443, 446. The counsel, acceding to the soundness of this position, after examining his requests anew, gave the judge to understand that he was satisfied with the manner in which the requests had been dealt with. That is the only reasonable interpretation of which the words "I am content" are susceptible under all the circumstances. It follows that no exception was saved. Therefore, that the bill of exceptions ought to have been disallowed. The allowance of the bill of exceptions by the judge cannot put life into exceptions which never existed. He could not affect the rights of the opposite party in this way.

It may not be amiss to add that an examination of the record does not disclose any error prejudicial to the substantial rights of the defendant.

Several months after a verdict had been rendered in favor of the plaintiff, the defendant filed a motion for a new trial on the ground of newly discovered evidence. To this motion were attached the affidavits of two persons who did not testify at the trial,

disclosing material evidence which each would give if called to the witness stand. But it appears from the exceptions that these "affidavits . . . state substantially only what the defendant and his witnesses testified these deponents told them." It is apparent from this fact that the evidence was not "newly discovered" and the judge so ruled correctly. It was known to the defendant at the time of the trial and in substance presented to the jury. The testimony of the affiants would have been only cumulative. Perhaps it would have been more advantageous to have had them called as witnesses. But, if the defendant was unable to procure their attendance at the trial, knowing what they had told to him and to his other witnesses, he could have protected his rights by motion and affidavit under Rule 30 of the Superior Court relating to motions for a continuance.

The granting of a motion for a new trial ordinarily rests in sound judicial discretion and is not subject to exception. There is nothing in this record to show abuse of discretion. *Powers v. Bergman*, 210 Mass 346. *Commonwealth v. Borasky*, 214 Mass. 313, 322.

There was no error of law in the denial of the requests for rulings under these circumstances.

*All exceptions overruled.*

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ANNIE REGAN vs. BOSTON AND MAINE RAILROAD.

Essex. March 27, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, In railroad station, Railroad.*

In an action by a woman against a railroad corporation for personal injuries sustained, when St. 1914, c. 553, was in force, in a station of the defendant by falling over a portable step when the plaintiff was walking toward the train for which she had purchased a ticket, where the plaintiff has testified that "as she walked down the platform she was looking straight ahead and that at no time did she remember looking down to see where she was stepping, nor did she at any time look to see where she was putting her feet as she walked along there," this does not show as matter of law that the plaintiff was negligent, and on this and other evidence the question whether under all the circumstances she was in the exercise of ordinary care properly may be left to the jury.

In an action against a railroad corporation by a passenger, who, when walking along the platform in a terminal railroad station to take a train for which he had purchased a ticket, was injured by falling over a portable step, of the kind usually placed on the station platform for the use of persons entering or leaving Pullman cars, that had been left unguarded and had been allowed to become displaced so as to be for some moments in the path of passengers on the way to their trains, it is a question for the jury whether the defendant was negligent in allowing the step to get out of place.

If, in such an action, it appears that the care of the use of such steps on the station platform was left by the defendant to the servants of the Pullman Company, the defendant is responsible for their negligence which results in harm to its passengers.

RUGG, C. J. The plaintiff, having bought her ticket for passage on the defendant railroad, on an October evening, in the year 1914, was walking on a platform in its North Station in Boston toward a car of the train on which she was to be carried, when she fell over a portable step and received injuries. There was evidence tending to show that the light was somewhat dim and that there were groups of people here and there on the platform. The obstacle over which she fell was the ordinary movable step usually placed on the platform for the convenience of persons using Pullman cars, five of which were attached to this train. The plaintiff had to pass these cars to reach the coach in which she was to travel. This step was not in its proper place at the entrance of any of the Pullman cars, but was on the platform about two feet from the side of one of them and opposite the first window from its forward end. No Pullman porter or employee of the defendant was near by. There was evidence that a porter had gone into the car, but none as to the length of time the step had been in the place where the plaintiff encountered it.

The plaintiff testified that "as she walked down the platform she was looking straight ahead, and that at no time did she remember looking down to see where she was stepping, nor did she at any time look to see where she was putting her feet as she walked along there." There was other evidence tending to show that she was careless. But it was for the jury to say whether on the whole she was using such attention and vigilance as would the ordinarily prudent person under all the circumstances, including the possibility of bags and other things being on the platform, and whether she ought to have been heedful of the likelihood of such an obstruction in such a place.

The step was left unguarded for some moments, though the period of time was not shown definitely. It was removed from its proper position. The jury found in answer to a question by the presiding judge \* that the only cause of the accident attributable to negligence was the fact that the step was out of place. The common use of such articles in connection with Pullman cars must have been known to the responsible agents and officers of the defendant. This factor distinguishes the case at bar from *Goddard v. Boston & Maine Railroad*, 179 Mass. 52, *Lyons v. Boston Elevated Railway*, 204 Mass. 227, and like cases.

If care in the use of such steps on its platform was left by the defendant to the servants of the Pullman Company, then the defendant is responsible for their negligence resulting in harm to its passengers.

Whether it was negligence to leave the step unguarded, so that it could become displaced several feet, was for the jury. The case is within the principle illustrated in *Anjou v. Boston Elevated Railway*, 208 Mass. 273. The charge of the judge of the Superior Court was fair and accurate.

*Exceptions overruled.*

The case was submitted on briefs.

*H. F. Hurlburt, B. B. Jones & D. E. Hall*, for the defendant.

*R. E. Burke & E. E. Crawshaw*, for the plaintiff.

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JOHN C. MASSIE vs. CHARLES K. BARKER.  
MABEL A. MASSIE vs. SAME.

Middlesex. March 27, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, In use of highway. Automobile.*

In an action against the proprietor of a motor truck for personal injuries sustained from the wagon in which the plaintiffs were driving on a highway having been run into from behind by the motor truck driven by a servant of the defendant in the winter time when the ground was frozen, neither of the plaintiffs saw the

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\* *Sanderson, J.* The jury returned a verdict for the plaintiff in the sum of \$750; and the defendant alleged exceptions.

collision and the driver of the motor truck testified that, after the plaintiffs' wagon had been turned to the right in response to a warning horn sounded by him and as he was about to pass the wagon on the left, a large sheep dog jumped in front of the car and that, yielding to an "impulse of the moment not to hit the dog," and not appreciating that he was endangering the plaintiffs, "I just yanked the car a fraction to prevent hitting the dog, and as I righted the car up again the next moment I skidded, and the top of my rear mud guard hit the left front wheel of the wagon." *Held*, that it could not have been ruled as matter of law that the defendant's driver was in the exercise of due care, and that the questions, whether the surprise occasioned by the sally of the dog was such as reasonably to cause the driver to be governed for the instant by impulse rather than by sound judgment, or whether the exercise of due care required him to observe with greater accuracy the direction of his car, were for the jury, who were at liberty to believe a part and discredit the rest of the driver's testimony.

TWO ACTIONS OF TORT, the first for personal injuries to the plaintiff and damage to the plaintiff's horse and wagon, with a second count for consequential damages by reason of injuries to the plaintiff's wife, all sustained on January 22, 1913, when the plaintiff's wagon, in which he was driving with his wife on Main Street in the town of Wayland, was run into from behind by a motor truck operated negligently by a servant of the defendant, and the second action by the wife of the plaintiff in the first action for personal injuries sustained in the same collision. Writs dated January 23, 1913.

In the Superior Court the cases were tried together before *Dana, J.* At the close of the evidence, the substance of which is described in the opinion, the defendant asked the judge to rule in each case that on all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the cases to the jury. The jury returned a verdict for the plaintiff in each case, in the first case in the sum of \$1,492, which afterwards was reduced to \$750, and in the second case in the sum of \$2,500. The defendant alleged exceptions.

*S. H. Batchelder*, for the defendant, submitted a brief.

*M. T. Hall*, for the plaintiffs.

*Rugg, C. J.* No question is raised as to the due care of the plaintiffs. The only controverted point is whether the defendant's servant, who was acting within the scope of his authority, might have been found on the evidence to have been negligent in operating a motor truck.

The plaintiffs were driving in a wagon and, having turned to



the right in response to a warning horn, were injured by a collision with the motor truck coming from behind. Neither of the plaintiffs saw the impact. The defence, that there is nothing to warrant a finding of negligence on the part of the driver of the truck, rests upon this evidence introduced by the defendant through the driver of the truck: "I first observed the wagon when I was a couple of hundred feet back of the team going down hill. I was travelling between eight and twelve miles an hour. As I approached the wagon I was to the left of the centre of the road, and the wagon was to the right of the centre of the road. As I got practically opposite the wagon, just as I was passing, a large sheep dog . . . jumped in front of the car. On the impulse of the moment I just yanked the car a fraction to prevent hitting the dog, and as I righted the car up again the next moment I skidded, and the top of my rear mud guard hit the left front wheel of the wagon. . . . I felt a jar when the car struck the wagon, and immediately applied the brake. . . . I had gone by that house before, and I had seen dogs there before . . . I made up my mind that I would pass them [the Massies] with about two or three feet between me and the team. . . . The dog that ran out is a large sheep dog. My best estimate is that he might have stood twenty-four inches from the ground. . . . I saw the dog when he came out of the drive. I heard the dog bark when he jumped out of the drive. I was paying particular attention at that time to passing the Massies. . . . A very small fraction of a minute elapsed from the time I first saw the dog and the time I turned my machine. For the fraction of a minute I did not think of the Massies. I only knew it was the impulse of the moment not to hit the dog. I did not realize when I started to turn the machine that I was endangering the Massies. I said that when I was coming down my attention was given to how I would pass the Massies. I did strike them. I supposed I was careful. I could not tell you how near I came to striking the dog,—the dog flashed by. He was coming in front of the machine, as I remember, and I think he went right across my path. I started to turn my machine just as he jumped in front. I did not lose my head that I know of. I was merely taken by surprise." Several other witnesses testified whose evidence corroborated that of the driver to a greater or less extent. The accident happened on January 22. There was evidence that the road was

bare, frozen hard, "some rough, frozen into ruts as it generally would be at that season of the year."

The law as to drivers of motor vehicles is not different from that which governs other persons. The standard required is that of the reasonably prudent person under all the circumstances. If some unforeseen emergency occurs, which naturally would overpower the judgment of the ordinary careful driver of a motor vehicle, so that momentarily or for a time he is not capable of intelligent action and as a result injury is inflicted upon a third person, the driver is not negligent. The law does not require supernatural poise or self control. But no one safely can drive motor vehicles amid the distractions and dangers likely to be encountered on the modern highway and street who is not reasonably steady of nerve, quick in forming an opinion and calm in executing a design. Whether the conduct of the defendant's agent measured up to the standard of common caution for the driver of a motor vehicle under all the circumstances, was a question of fact.

The jury might have believed a part and discredited the rest of the testimony of the witnesses called by the defendant. It well might have been found that the truck did not skid in view of the condition of the road, the season of the year and the manner and place in which the truck struck the wagon, and that the injury was the result of the direction and speed given to the truck by the driver. Manifestly one exercising due care cannot hesitate in preferring the safety of human beings to that of dogs. It could not have been ruled as matter of law that the defendant's driver was in the exercise of due care. The jury might have found that due care required him to observe with greater accuracy the direction of his car, to determine not to deflect so much toward the right to avoid the dog, and to hold his faculties under such control as not to be disconcerted by the appearance of the dog. Whether the surprise occasioned by the sally of the dog from the yard into the highway was such as reasonably to cause the driver of the truck to be governed for the instant by impulse rather than by sound judgment, whether it was a discomposing exigency or a usual peril of the road, was a matter for the jury.

The charge of the judge was a fair amplification of correct principles of law and was not open to exception.

*Exceptions overruled.*

RIVERBANK IMPROVEMENT COMPANY vs. EDWIN CHAPMAN  
& another, trustees, & others.  
SAME vs. SARAH A. CHADWICK & another, trustees, & others.

Suffolk. March 27, 28, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Land Court. Practice, Civil, Report by judge.*

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a judge of the Land Court has no power to report questions of law for determination by this court until the case reported is ripe for the entry of a final decree in the Land Court. Following the rule in *Welsh, petitioner*, 175 Mass. 68.

RUGG, C. J. One of these cases is a petition for the registration of the title to certain land in Boston free from restrictions imposed in an agreement and deeds which appear of record to incumber the title, on the ground that such restrictions are not now valid and enforceable by reason of changes in the neighborhood.

The other case, for the registration of the title to other land subject of record to the same or similar restrictions, is a petition founded on the jurisdiction sought to be conferred upon the Land Court by St. 1915, c. 112.

Numerous questions of law involving the right of several persons to be heard as parties, the extent of territory subject to the restrictions, the construction of divers agreements and deeds, the right to amend the first petition into one under St. 1915, c. 112, and the constitutionality of the latter statute, have been heard and decided by the Land Court. But there has been no hearing on the merits.

So far as any of these questions goes to the merits of the cases they have been determined in favor of the petitioners, so that according to the rulings of the Land Court there must be further hearings on evidence, involving perhaps further important rulings upon questions of law, before that court will be ready to render a final decision or to enter a final decree.

The judge of the Land Court \* has attempted to report for the

\* *Davis, J.* The judge at first refused a request of all the parties to report the questions raised, basing his refusal on *Welsh, petitioner*, 175 Mass. 68, but

determination of this court these numerous questions of law before proceeding to a hearing on the merits.

A preliminary inquiry is whether the Land Court has power to make a report under these circumstances. The Land Court is a statutory court, not of general but of strictly limited jurisdiction. R. L. c. 128, § 1, as amended by St. 1904, c. 448, § 1, and St. 1910, c. 560, § 3.

While the power to report to the full court questions of law arising at any stage of a case long has been exercised by justices of this court (which has been recognized by statute), that power exists in other courts only to the extent conferred by the express terms of the statutes. *Terry v. Brightman*, 129 Mass. 535, 537. *John Hetherington & Sons, Ltd. v. William Firth Co.* 212 Mass. 257. *Newburyport Institution for Savings v. Coffin*, 189 Mass. 74.

Authority is conferred upon the Land Court by St. 1904, c. 448, § 8; R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, in these words: "Questions of law arising . . . on any decision or decree may be taken by any party . . . directly to the Supreme Judicial Court for revision in the same manner in which questions of law are taken to that court from the Superior Court. The Land Court, after any decision or decree dependent upon questions of law, may report such decision or decree, with so much of the case as is necessary for understanding such questions of law, for the determination of the Supreme Judicial Court." These statutory words are the same as those in St. 1898, c. 562, § 14, and St. 1899, c. 131, § 2. It was said, respecting the extent of the power of the Land Court to report under those acts, by Chief Justice Holmes, in *Welsh, petitioner*, 175 Mass. 68, 70: "It seems to us enough if the case is ripe for judgment or decree and the report shows that a decree would be entered were it not for the question of law, and provides for a decree when the doubt upon that question is resolved. Under such circumstances the actual entry of the decree before sending the case up is a pure form. . . . We agree that what we have pronounced sufficient is the least that will do, and that a question cannot be reported when it does not appear that an order or decree will follow the decision as a consequence." It is manifest that under the test thus established the present cases are far from the later decided to make the report as being in the interest of justice within the decision of *John Hetherington & Sons, Ltd. v. William Firth Co.* 212 Mass. 257.

stage where they are ready for a report. If every ruling and decision made by the Land Court should be held to have been right, no order or decree would follow as a consequence, but only a hearing on the merits, the finding on which might render all these questions of law wholly immaterial to the final decision of the cases. *Weil v. Boston Elevated Railway*, 216 Mass. 545.

The statute does not confer upon the Land Court the same power to report that has been granted to the Superior Court by R. L. c. 159, §§ 27, 29, and by c. 173, § 105, as amended by St. 1910, c. 555, § 5. The circumstance that by the latter act the power of the Superior Court to report to the full court was enlarged, while by St. 1910, c. 560, approved three days later, that of the Land Court was re-enacted in its old words without enlargement, is strong proof that there was intended by the Legislature no change from the powers held to have been possessed by the Land Court by *Welsh, petitioner, ubi supra. Welch v. Boston*, 211 Mass. 178, 185.

In this connection the fact that when the *Welsh* case was decided there was a general right of appeal from the Land Court to the Superior Court, which court might have reported such questions of law as here are raised to the full court, a general right of appeal which no longer exists, is irrelevant. It remains true that the power of the Land Court to report is the same and has not been enlarged.

Nor is it of consequence that the jurisdiction of the Land Court is assailed in one case and the constitutionality of St. 1915, c. 112, is attacked in the other. The Land Court, having decided both those questions in such way that the cases are not ripe for judgment, has no power to report until they are ready for final disposition. See *Weil v. Boston Elevated Railway*, 216 Mass. 545, 549, 550.

The inevitable conclusion is that the Land Court has no power to report questions of law such as are disclosed on this record, which relate to purely interlocutory matters.

*Report dismissed.*

*B. Corneau*, (*F. King* with him,) for the petitioner.

*A. L. Taylor*, for the trustees under the will of John N. Ladsen-sack and for the trustees under the will of Henry N. Chadwick.

*J. D. Graham*, for the respondents Eugene B. Hagar and Anna H. Stone.

*P. N. Jones*, for the respondent Fannie E. Hurlburt.  
*Lee M. Friedman*, for the respondent Congregation Adath Israel.  
*F. W. Bacon*, for the respondents Mary E. Holden and T. C. Hollander.

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LIZZIE M. CHAPMAN vs. FLORENCE E. CHAPMAN.

Suffolk. March 29, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Probate Court*, Procedure on appeal. *Equity Pleading and Practice*, Master's report. *Marriage and Divorce. Judgment. Jurisdiction*, Submitted to by collusion. *Wrongdoer without Remedy*.

Under R. L. c. 162, § 15, which provides that probate appeals "shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases," a reference of a probate appeal to an auditor "to hear the parties and their evidence, to find the facts, and report the same to the court" will be treated as a reference to a master and the auditor's report will be treated as a master's report.

Where a woman by collusion with her husband appeared in a suit for divorce brought by him against her in another State in which neither of them had a domicile and allowed a decree for divorce to be obtained against her there for a cause recognized as a cause for divorce in this Commonwealth and which did not occur in this Commonwealth, and accepted a payment of money in full for all payments of alimony, and thereupon her former husband married another woman, and where thereafter the former wife brought a suit for divorce in which the first decree collusively obtained was declared to be valid and binding, and thereupon she married another man, she will not be allowed, upon the death of her former husband, from whom she collusively obtained the divorce, to set up such collusion and the want of jurisdiction of the court that granted the divorce and to claim the rights of a widow in her former husband's estate.

PETITION, filed in the Probate Court for the county of Suffolk on March 27, 1915, alleging that the petitioner was the widow of Hiram T. Chapman, late of Revere, whose estate was in the course of settlement in that court, and praying that she might be allowed a part of the personal estate of the deceased as necessities for herself and family in addition to the articles allowed her by law as such widow.

In the Probate Court the case was heard by *Grant, J.*, who made

the following decree: "It appearing that she is not the widow of said deceased, for the reason that the divorce procured by said deceased from his first wife, Florence Elliott Chapman, in South Dakota, was void because the court which granted said divorce did not have jurisdiction of the parties: It is decreed that said petition be dismissed." The petitioner appealed.

The reference to the so called auditor, referred to in the opinion, was made in the Supreme Judicial Court and was as follows: "And now it is ordered that the above-entitled cause be referred to Franklin T. Hammond, Esq., as auditor, to hear the parties and their evidence, to find the facts, and report the same to the court."

Later the case came on to be heard by *Loring, J.*, who by agreement of counsel reported it upon the auditor's report and the exhibits and a stipulation of the parties for determination by the full court.

R. L. c. 162, § 15, referred to in the opinion, is as follows: "Appeals and petitions for appeals shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases."

*S. Vaughan*, (*J. Noble* with him,) for the petitioner.

*A. W. DeGoosh*, for the respondent.

*Rugg, C. J.* The officer of court appointed in the case at bar to "hear the parties and their evidence, to find the facts, and report the same to the court," was termed an auditor. The case is a probate appeal. Under R. L. c. 162, § 15, the procedure in probate appeals is according to equity. Cases may be found where in equity an officer called an auditor has been appointed. See, for example, *Quimby v. Cook*, 10 Allen, 32. It was said also in *Whitwell v. Willard*, 1 Met. 216, at page 218: "The term 'auditor,' designates an officer, either at law or in equity, assigned to state the items of debt and credit between parties, and exhibit the balance," and this remark was quoted in *Fisk v. Gray*, 100 Mass. 191. But it was held in *Falmouth v. Falmouth Water Co.* 180 Mass. 325, 328, that, notwithstanding *Whitwell v. Willard*, "In *Holmes v. Turner's Falls Co.* 150 Mass. 535, it was intimated by this court that under existing statutes masters are to be appointed in suits in equity where auditors are appointed in actions at law. In our opinion that intimation is correct, and we shall treat the report

made in this case as a master's report." To the same effect in substance, are *Norwood, petitioner*, 183 Mass. 147, 151, and *Gray v. Chase*, 184 Mass. 444, 448. See *Stockbridge v. Mixer*, 215 Mass. 415, 419. The decisive factor is not a designation given to an appointee of the court, but the nature of the duties imposed on him and the character of the work performed by him. The reference in the case at bar appropriately describes the duties of a master. *Warfield v. Adams*, 215 Mass. 506, 519. *Bradley v. Borden*, 223 Mass. 575. It would have been more accurate to have called him a master. His report will be treated as the report of a master.

The question presented is whether the appellant or the appellee is the widow of Hiram T. Chapman, deceased, late of Revere in this Commonwealth. The salient facts are these: Hiram, then domiciled in this Commonwealth, was legally married to Florence, the appellee, in Boston in July, 1894. They lived together as husband and wife in Boston until the following October, when they went to Nebraska to visit the mother of Florence, where they remained until January, 1895, during which time difficulties arose between them. In January, 1895, Hiram went to Fargo, North Dakota, and exactly ninety days from the date of his arrival filed in a court of that State a complaint for divorce on the grounds of extreme cruelty. Florence duly appeared and answered, admitting Hiram's residence in North Dakota and her marriage with him. In September, 1895, a divorce was entered on this petition. In December, 1895, Hiram returned to Massachusetts. A year later he married in New York Lizzie, the appellant, then domiciled in Massachusetts. After living at various beaches and spending a winter in Washington and another in Virginia, and the third in Boston, they established a home in Revere, where they have lived ever since until his death in August, 1914. In November, 1902, Florence brought a petition in equity against Hiram in Nebraska, alleging desertion and claiming separate support. Hiram appeared and answered, setting up the North Dakota divorce. Florence replied, alleging that neither she nor Hiram was a resident of North Dakota at that time, that the North Dakota law required as a condition precedent to jurisdiction in an action for divorce that the petitioner should have been a resident in good faith and domiciled in North Dakota for at least ninety days before bringing his peti-



tion, and that as this condition was not complied with the North Dakota decree was null and void. After a contested hearing, the Nebraska court found that the North Dakota divorce was illegal, because neither party was domiciled in that State and both knew that Hiram was there for the purpose of securing a divorce, and that they perpetrated a fraud upon the North Dakota court. That decision was reversed because of error in the admission of evidence and in the character of the judgment awarded. *Chapman v. Chapman*, 74 Neb. 388. In March, 1907, Florence moved to dismiss this proceeding "with prejudice," and thereupon the following order was made: "This cause coming on on the motion of the plaintiff to dismiss this case with prejudice, it is by the court ordered that this case be and same hereby is dismissed." During the pendency of these proceedings in Nebraska Hiram brought a libel for divorce against Florence in the Superior Court for this Commonwealth. Personal service was made on her in Nebraska and she appeared and answered. The case was in order for trial in February, 1907, but no trial was had and no proceedings have been taken since. In 1910 Florence brought a petition against Hiram for divorce in the same court in Nebraska where in 1902 she had brought the previous proceeding for separate support. Hiram appeared and set up in defence the North Dakota divorce. In November of that year the Nebraska court entered a decree holding that the North Dakota court had full jurisdiction to grant the divorce, that it was still in full force and effect and that the petition should be dismissed. Nine days later she went through the marriage ceremony with one Hough. They have cohabited as husband and wife since then in South Dakota and she has been known by the name of Hough.

It has been found expressly by the master that Hiram did not go to North Dakota to obtain a divorce for a cause which occurred in Massachusetts while he and Florence resided here. The cause alleged in the North Dakota libel was extreme cruelty, which is established as a cause for divorce by R. L. c. 152, § 1. The master was unable to find that the evidence upon which that divorce was granted would not have warranted the granting of a divorce by the courts of this Commonwealth. An inevitable consequence of this finding is that the North Dakota divorce is not such a divorce as R. L. c. 152, § 35, provides "shall be of no force or effect

in this Commonwealth." \* The earlier part of that section declares that the divorces in other States and countries by courts "having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth." This is simply assertive of the validity of certain foreign divorces. The denial of validity of other foreign divorces which follows is not precisely correlative or antithetical. It does not extend to all such divorces by courts not "having jurisdiction of the cause and of both the parties," but to the narrower field where a resident of this Commonwealth resorts to a foreign court to obtain a divorce for a cause which occurred while both spouses resided here, or which is not recognized as a cause by our laws. Manifestly this negation is not so comprehensive as the positive declaration of the earlier part of the section.

On the present findings a case is presented where the parties, being residents of Massachusetts and not domiciled in the foreign State, go there for the purpose of procuring a divorce for a cause recognized as a cause by the law of this Commonwealth but which did not occur here during the period of their residence within the State. This is a state of facts not within the scope of the words of R. L. c. 152, § 35. The Commonwealth has not intervened by legislation to declare a governing public policy, as it had in *Andrews v. Andrews*, 176 Mass. 92. The case, therefore, must be considered and decided on general principle concerning the marriage relation.

The pivotal question in many, perhaps in most, cases would be whether the foreign court obtained "jurisdiction of the cause and of both the parties." If it did not, then it could not sever the marriage relation. This was the ground of decision in *Andrews v. Andrews*, 188 U. S. 14, 32. The case at bar is different from *Andrews v. Andrews*, 176 Mass. 92, affirmed in 188 U. S. 14, 32, in that there the cause of divorce set forth in the South Dakota record was one

\* Section 35. "A divorce decreed in another State or country according to the laws thereof by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth."

for which divorce could not be granted in Massachusetts. The State had intervened and declared all such divorces null and void in this Commonwealth. Here the cause set forth in the North Dakota record is one for which divorce is allowed in this Commonwealth. This is the converse of *Andrews v. Andrews*. Florence does not get "the benefit of" the intervention of the Commonwealth by legislation "irrespective of any merits of her own." 176 Mass. 96. She must stand on the strength of her own case, because, as has been pointed out, the legislative declaration of policy does not reach to these facts.

The master has found that the court of North Dakota had no jurisdiction of the parties and the cause. The subsidiary facts appear to warrant this finding. *Dickinson v. Dickinson*, 167 Mass. 474, 477. The evidence is not all reported and this finding must be accepted as final. He also has found that Florence had acquired no domicil in Nebraska and that the decree of the court of that State entered in the 1910 proceeding for divorce instituted by her, she having no domicil there, was not within the jurisdiction of that court, *Haddock v. Haddock*, 201 U. S. 562, 571, so as to render applicable to it the doctrine of *res judicata* within *Hood v. Hood*, 110 Mass. 463. There is the further finding that that decree was not entered after a trial on the merits of the case and that hence under *Foye v. Patch*, 132 Mass. 105, 110, it is not conclusive. No finding has been made as to the effect of the separate support decree on the action begun in Nebraska in 1902. For reasons to be stated it is not necessary to consider the exact juridical effect of these several proceedings and the master's findings thereon.

Florence urges that the questions of the jurisdiction of the Nebraska and North Dakota courts are the only ones presented by the strict logic of the record and the law. But there is a preliminary question which affects her own status in the present proceeding and which arises out of her conduct touching these various earlier proceedings. She appeared and attempted to give jurisdiction to the North Dakota court. She colluded with Hiram to get that divorce and was paid \$2,500, which she accepted in full of all claims for alimony which she had against Hiram. While the master says that no evidence was offered as to the consideration given by Hiram to Florence for the entry of the decree dismissing the separate support case begun in 1902 in Nebraska, he

finds that "the inference is irresistible that some consideration was paid." It does not appear whether she was paid anything in connection with the final disposition of the last litigation in Nebraska, started in 1910, on the face of which the North Dakota divorce was declared to be valid and binding. At all events, she speedily acted on the assumption that all doubt as to the absolute and complete severance of her marriage with Hiram was put at rest. Her marriage to Hough was the most conclusive assertion possible to this effect.

The person who now contends that she is the widow of Hiram collusively participated in a form of divorce proceedings which has terminated in his favor, has instituted two attacks upon its validity in each of which he has taken part and both of which in form have terminated by a decision in favor of the validity of that divorce; she has been paid a considerable sum of money on the theory of ending her financial interest in Hiram, and she has declared in favor of the validity of that divorce by the most positive act of which such matters are susceptible.

These facts bring the case within the authority of *Loud v. Loud*, 129 Mass. 14. In that case a husband who had been married and was domiciled in Massachusetts left his wife here and went to Maine, where he straightway filed a libel for divorce. The wife appeared and later withdrew her opposition upon being paid a substantial sum of money. A divorce was granted. The husband married again and the first wife brought against him a libel for divorce grounded on the cohabitation incident to this second marriage. It was not found that the husband went to Maine to obtain a divorce in violation of the terms of the statute now found in R. L. c. 152, § 35. It was said by Chief Justice Gray (pages 18, 19): "The conclusive answer to this libel is, that the wife not only appeared in the suit brought by the husband, but that she afterwards executed a release, reciting the divorce therein obtained by him, and for a pecuniary consideration discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marital obligations to herself. The defence is allowed, not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage. *Kirriگان v. Kirriگان*, 2 Mc-

Carter, 146. *Palmer v. Palmer*, 1 Sw. & Tr. 551. *Boulting v. Boulting*, 3 Sw. & Tr. 329, 335. *Gipps v. Gipps*, 3 Sw. & Tr. 116, and 11 H. L. Cas. 1. *Pierce v. Pierce*, 3 Pick. 299."

Where one party to the marriage has connived at the procurement of a divorce by the other in another jurisdiction, which is not declared void here by our statute, has subsequently invoked voluntarily the jurisdiction of the courts of another State in which the other party has appeared and two decrees have been entered, the effect of which is to declare the divorce valid, that spouse cannot be heard for his own advantage to question the jurisdiction of the courts to enter a judgment which has barred his rights.

Where a party has invoked the jurisdiction of a court and the other party has voluntarily appeared and submitted thereto, it is not consonant with ordinary conceptions of justice to countenance an attempt at repudiation of that jurisdiction, especially when the attempt would involve the receiving of considerable sums of money without consideration, the confession of bigamy and the unsettlement of other domestic relations presumably entered upon in innocent reliance upon the jurisdiction of such court. Since the Nebraska judgments were obtained at the instance of Florence, and the North Dakota divorce by her collusion, she "has no right to complain of the consequences which might naturally be expected to follow." *Palmer v. Palmer*, 1 Sw. & Tr. 551, 553.

It is not necessary to determine to what extent, if at all, these proceedings in Nebraska and North Dakota would affect the rights of other persons not parties to them. We go no further than to say that under these circumstances the appellee cannot be heard to assert that she is the widow of Hiram. This is not on the ground of strict estoppel, but because she has connived at another marriage by him and has entered into a marriage relation herself which would be a crime without the severance of the marriage with Hiram. This principle is closely analogous to that applied in *Brigham, petitioner*, 176 Mass. 223, and *Ewald v. Ewald*, 219 Mass. 111.

This result is supported by decisions in many other jurisdictions, though the grounds upon which they are put are not identical in all the cases, and perhaps are not such in all instances as we should adopt. Collectively they disclose a strong disposition on the part of courts not to aid one in the position of this appellee. *Matter of Swales*, 60 App. Div. (N. Y.) 599, 602, affirmed in 172 N. Y.

651. *Davis v. Davis*, 61 Maine, 395. *In re Ellis*, 55 Minn. 401, 413. *Marvin v. Foster*, 61 Minn. 154, 160. *Richardson's estate*, 132 Penn. St. 292. *Mohler v. Shank*, 93 Iowa, 273, 280. *Karren v. Karren*, 25 Utah, 87, 93. *Gans v. Gans*, 7 Buch. 309, 312. *Guggenheim v. Wahl*, 203 N. Y. 390, 397. *Kinnear v. Kinnear*, 45 N. Y. 535. *Arthur v. Israel*, 15 Col. 147. *Stephens v. Stephens*, 51 Ind. 542. *Bourne v. Simpson*, 9 B. Mon. 454. *Richeson v. Simmons*, 47 Mo. 20. *Zoellner v. Zoellner*, 46 Mich. 511, 514. *Robinson v. Robinson*, 77 Wash. 663. *Bledsoe v. Leaman*, 77 Kans. 679. *Sedlak v. Sedlak*, 14 Ore. 540. *Bruguiere v. Bruguiere*, 172 Cal. 199.

*Decree of Probate Court reversed.*

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RALPH POIRIER vs. MANUEL R. TERCEIRO.

Bristol. May 15, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

*Agency*, Existence of relation. *Evidence*, Failure to call witness.

In an action by a boy, who when coasting down a street "duly licensed for coasting" was injured by a horse belonging to the defendant and ridden by a minor son of the defendant, the defendant testified that he did not know of the use of the horse by his son and had given him no permission to use it. The plaintiff contended that it might be inferred from the evidence that the horse on the day of the accident needed sharpening and that the defendant's son either was going to or returning from a blacksmith's shop, but there was no evidence that this was being done with the knowledge or consent of the defendant. There was evidence that the defendant's son had been seen a number of times driving this horse attached to a grocery wagon. *Held*, that there was no evidence for the jury that the defendant's son was acting as the servant or agent of his father at the time of the plaintiff's injury.

In an action for personal injuries caused by a horse of the defendant when ridden by a minor son of the defendant, where there was no evidence that the defendant's son was acting as the servant or agent of his father and the defendant did not call his son as a witness, it was *held* that no inference could be drawn against the defendant from his failure to call his son as a witness when there was nothing for him to refute.

TORT by a minor by his next friend for personal injuries sustained by the plaintiff on February 5, 1912, when he was coasting down Osborne Street in Fall River, "said street having been duly

licensed for coasting by the duly constituted authorities of the city of Fall River," and was injured by a horse of the defendant, ridden by the defendant's minor son about fourteen years of age, which jumped over the sled and kicked the plaintiff. The declaration contained two counts, with a third which was waived, the first count alleging negligence of the defendant's son in the management of the horse and the second count alleging negligence of the defendant in entrusting the horse to his son who was unfit and unable to manage it. Writ dated May 23, 1912.

In the Superior Court the case was tried before *McLaughlin, J.* There was evidence that at the time of the accident the plaintiff was in the exercise of due care and that the defendant's son was negligent, and the only question raised by the exceptions was whether there was evidence on which the jury were warranted in finding that the rider of the horse, the defendant's son, "was a servant of the defendant acting in the scope of his employment at the time of the accident." The evidence on this issue is described in the opinion.

At the close of the plaintiff's evidence the defendant asked the judge to rule that on the whole evidence the plaintiff could not recover. The judge said he would make no ruling until the defendant rested; whereupon the defendant rested, and asked the judge to rule as follows:

"1. That upon the whole evidence the plaintiff cannot recover."

"4. That there is no affirmative evidence that at the time of the alleged accident the rider was in the employ of the defendant or was acting within the scope of his employment, in the absence of which the plaintiff cannot recover."

The judge refused to make the rulings requested, and "submitted the case to the jury under full and appropriate instructions, to which no exceptions were taken." The jury returned a verdict for the plaintiff in the sum of \$1,243.83; and the defendant alleged exceptions to the refusal to make the rulings requested by him.

The case was submitted on briefs.

*F. M. Silvia & E. T. Murphy*, for the defendant.

*C. L. Baker, E. A. Thurston & B. Cook, Jr.*, for the plaintiff.

CARROLL, J. The bill of exceptions states that Osborne Street in the city of Fall River had "been duly licensed for coasting." The plaintiff, while on a sled on this street, was injured by

a horse owned by the defendant and ridden by his minor son. The only question presented is: Was the minor son of the defendant his servant and acting within the scope of his employment?

The defendant denied any knowledge of the use of the horse by the boy or any permission to use it. This evidence was not contradicted. There was nothing to show for what purpose the boy was riding the horse, and, even if it could be argued that on this day the horse needed sharpening, that the defendant's blacksmith was Shea, whose shop was on Eleventh Street and that the defendant's son was either going to or returning therefrom, there is no evidence to show that this was done with the knowledge or consent of the defendant. The plaintiff's father testified that he had seen the defendant's son several times driving this horse attached to a grocery wagon; but there was nothing to show that the boy was acting as the servant or agent of the defendant at the time of the plaintiff's injury. *Trombley v. Stevens-Duryea Co.* 206 Mass. 516. *Fletcher v. Willis*, 180 Mass. 243

As, on the evidence presented, the boy could not be found to have been in the employ of the defendant at the time of the plaintiff's injury, it becomes unnecessary to decide whether in going to or returning from the blacksmith shop he was called upon to pass over Osborne Street, and so had departed from the scope of his employment, even if he were then the defendant's servant.

There being no evidence of the employment by the defendant of his minor son, no inference could be drawn against him from his failure to call him as a witness. In *Tully v. Fitchburg Railroad*, 134 Mass. 499, 502, the plaintiff was struck at a crossing by one of the defendant's engines. The engineer and the fireman in charge of the engine were in court at the time of the trial and were not called by the defendant. It was urged that from this fact an unfavorable inference might be drawn. Colburn, J., said: "This would have been so, if the plaintiff introduced evidence tending to sustain her claim; but she could not prove her case by making allegations, and asking the jury to consider them proved because, if they were not true, the defendant had the means of showing it. These witnesses might have been called by either side." See also *Backus v. Spaulding*, 129 Mass. 234, 235; *McKim v. Foley*, 170 Mass. 426, 428; *Buckley v. Boston Elevated Railway*, 215 Mass. 50, 56.

*Exceptions sustained.*



## WILLIAM ANDERS vs. ELSIE ANDERS.

Hampden. September 27, 1915. — June 21, 1916.

Present: RUGG, C. J., LORING, CROSSBY, PIERCE, &amp; CARROLL, JJ.

*Marriage and Divorce, Annulment.*

Where a woman, who had promised to be a faithful wife, went through a marriage ceremony solely to secure the right to appear as a married woman and thus to conceal the fact that she had had an illegitimate child, secretly intending to leave her husband immediately after the ceremony to go to a foreign country and not to see him again, and carried that plan into effect, the husband, who was deceived and acted in good faith, is entitled under R. L. c. 151, § 11, to a decree annulling the marriage.

**LIBEL**, filed in the Superior Court on October 18, 1913, under R. L. c. 151, § 11, to annul a marriage performed on October 16, 1913.

In the Superior Court the case was heard by *Dana, J.*, who reported it for determination by this court. The report was as follows:

The libellant was a widower, whose wife died some three and one half years before, leaving two children whose ages were seven and five respectively. He became acquainted with the libellee nearly a year before the hearing, and for about five weeks before the marriage ceremony employed the libellee as his housekeeper and to look after his children, and she did this work for about five weeks. When she came to work for the libellant, she brought with her her illegitimate child, about one year and eight months old, born to her by somebody unknown to the libellant. Finding the expense of a paid housekeeper too great, the libellant decided to break up housekeeping and put the children out to board. Before doing this, he suggested to the libellee that it would be better for both of them to get married, and he proposed marriage, but was not accepted. The libellee later was discharged by the libellant, and moved her trunks to a room in the same city. About a week after she left the employ of the libellant, she called on him, and said that she was willing to be married and that she would be a good mother to the children and be a good wife. On the Friday afternoon preceding October 16, 1913, they both went to the city

clerk of Holyoke and procured a marriage license the following day, and arrangements were made to have the ceremony performed on the ensuing Thursday, October 16, 1913. The marriage ceremony was performed on October 16, 1913, near one o'clock, about one week after making the marriage contract. After the marriage ceremony, they walked from the clergyman's house about a square, which walk did not consume more than five minutes. No trouble arose between them during this walk. As they reached a street corner the libellee stated to the libellant that she wanted to go to the dentist's, and that she would be down at the house about three o'clock. The libellant returned to his home, where his sisters and brothers and a cousin had assembled; they waited until late in the evening, but the libellee did not come there that night, nor has he seen her since. About three weeks after she left him, he received a letter from her from Braunschweig, Germany, where her mother lived, wherein the libellee stated that she did not know what she was doing; that she must have been crazy at the time and that she never would see him again. Before the marriage engagement and during its pendency and before the marriage ceremony the libellee had been making all necessary arrangements to go to Germany. She wanted to go to Germany, but, having a child, inquired of a friend several days before the marriage how she should sign her name, Miss or Mrs., and was told that she would require marriage papers to satisfy the authorities. She stated to this friend that she did not know whether her mother would want her or not. She also stated that she was going to get her ticket perhaps to-morrow, and that she wanted to draw her money out of the bank that day. This was about four days before the marriage but after the marriage contract was entered into. At no time did the libellee intend to comply with her marriage contract as made with the libellant or intend to fulfil the marriage vows and obligations; the marriage contract as made by her and the ceremony performed never were consummated by their living together as husband and wife or ever having sexual intercourse with each other; her only object in getting married was that she could go back to Germany to her mother's with a marriage name and marriage standing on account of her child and herself, or to satisfy the authorities. She married the libellant for the sole purpose of getting a marriage name in order that she might satisfy

her mother that she was married or to satisfy the authorities. She never intended to live with the libellant as his wife or to care for his children or to fulfil the marriage obligations; she entered into the marriage ceremony and had the marriage ceremony performed with intent to defraud and deceive the libellant, and the libellant was deceived and defrauded into marrying the libellee. The libellant did not know of the fraud and deceit practiced upon him, and the contract and ceremony were made and performed on his part in good faith and in the belief that the libellee would fulfil the marriage contract and obligations. At no time of the contract and marriage ceremony did the libellee intend doing so. The contract was fraudulent and the libellant was induced into the marriage contract and to have the same performed by the deceit and the false representation made by her to him that she would live with him as his wife and take care of his children and fulfil the obligations of the marriage contract, and the libellant was misled into the contract of marriage and having the same performed through the misrepresentation and deceit made to and practiced upon him by the libellee.

Notice of the libel was sent to the libellee by registered mail and the receipt was returned in handwriting identified as that of the libellee, and service also was made by publication.

The case was submitted on a brief by the libellant.

*P. H. Sheehan*, for the libellant.

- ✓ LORING, J. It was decided in *Dickinson v. Dickinson*, [1913] P. 198, that wilful and persistent refusal on the part of the wife to allow any marital intercourse was ground for a decree of nullity of the marriage at the suit of the husband. The earlier cases in England had proceeded upon the ground that in such a case incapacity in fact on the part of the wife must be made out to enable the husband to get such a decree. But upon great consideration it was held in that case that the objects for which matrimony exists are as much defeated in case the wife wilfully persists in refusing to have marital intercourse when she can as they are in a case where she is willing but for some reason cannot.

It has been decided here on the authority of the English cases preceding *Dickinson v. Dickinson*, *ubi supra*, that incapacity is ground for a decree of nullity. *S* ——— v. *S* ———, 192 Mass. 194. That was a case of partial malformation in both the husband and

wife which resulted in incapacity in case of the two. There is an earlier case in this Commonwealth in which it was held that utter denial of marital intercourse was not ground for a decree of nullity. See *Cowles v. Cowles*, 112 Mass. 298. In that case no consummation of the marriage had ever taken place. The whole contention was disposed of in that case in less than two lines and in these words: "It plainly does not go to the original validity of the marriage, and affords no ground for declaring the nullity of it." Interpreting the terms of that opinion in the light of the libellant's brief in that case it is pretty plain that in deciding *Cowles v. Cowles* this court did not have in mind the case of a woman going through the marriage ceremony with a preconceived intention never to allow marital intercourse.

But however that may be, the facts in the case at bar go far beyond those in *Cowles v. Cowles*. In the case at bar the libellee went through the marriage ceremony with an intention never to perform any one of the duties of a wife. She went through the ceremony solely to secure a right to bear the name of a married woman and in that way to hide the shame of having had an illegitimate child, intending to leave her husband at the church door and not see him again. That plan she carried into effect. It is settled that a contract for the sale of goods is induced by fraud and for that reason voidable where the purchaser had an intention when the contract was made not to perform his promise to pay for them. If an intention not to perform his promise renders a contract for purchase of property voidable, *a fortiori* the same result must follow in case of a contract to enter into "the holy estate of matrimony." See generally in this connection *Barnes v. Wyeth*, 28 Vt. 41.

Cases, where a defendant in a bastardy complaint goes through the form of marriage with the woman in question to secure his discharge intending never to live with her, well may involve other considerations. See in this connection Bish. Mar. Div. & Sep. § 476, and cases there cited.

We are of the opinion that upon the facts set forth in the report the petitioner is entitled to a decree.

*So ordered.*

BOSTON SAFE DEPOSIT AND TRUST COMPANY vs. IVERS  
S. ADAMS.

IVERS S. ADAMS vs. BOSTON SAFE DEPOSIT AND TRUST  
COMPANY.

Suffolk. November 5, 1915. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

*Equity Jurisdiction*, To compel transfer of shares to pledgee. *Corporation*, Foreign, Transfer of shares. *Pledge*. *Uniform Stock Transfer Act*.

Where the owner of shares in a foreign corporation deposits the certificate for the shares with a stockbroker as additional margin to secure his account, signing his name on the back of the certificate below certain extracts from the articles of association of the corporation but signing no power of attorney and failing to comply with the requirements of the foreign law in regard to transfers of shares, expressing at the time of the deposit a willingness to sign a proper transfer when requested by the stockbroker to do so, and where the stockbroker pledges this certificate of shares to a trust company to secure a loan to him, and thereafter the stockbroker becomes bankrupt and the trust company then demands from the original pledgor a transfer of the shares to it, if at that time the stock transactions have come to an end and the pledgor owes nothing to the stockbroker on account of margin and refuses to make the transfer and demands from the trust company the surrender of the certificate, a bill in equity by the trust company to compel a transfer of the shares to it will be dismissed, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him.

In the case above described it was *said* that, although the provision of the uniform stock transfer act contained in St. 1910, c. 171, § 9, relating to the transfer of certificates of shares does not apply to a transfer of shares in such a foreign corporation, yet the general rule of equity applicable to the case is stated correctly in § 9.

BILL IN EQUITY, filed in the Superior Court on November 27, 1914, praying that the defendant might be ordered to execute a transfer to the plaintiff of a certificate for one thousand and eighty-five ordinary shares of one pound each of the Linen Thread Company, Limited, which was deposited with the plaintiff by Gay and Sturgis on June 12, 1913, with other securities as security for a loan of \$10,000 made to them by the plaintiff on that day; also a

CROSS BILL, filed in the Superior Court on January 14, 1915, by Ivers Shepard Adams, the defendant in the first case,

against the Boston Safe Deposit and Trust Company, the plaintiff in the first case, praying that that trust company might be ordered to deliver to the defendant Adams as the plaintiff in the cross bill the certificate of shares mentioned above.

The case was heard by *Morton, J.*, who made the findings of fact which are stated in the opinion. He ruled as matter of law that the plaintiff trust company was entitled to the relief prayed for by it, and reported the case for determination by this court upon the pleadings and the findings of fact with an agreement of counsel that, if the ruling of law was right, a decree should be entered for the plaintiff trust company in accordance with a form agreed upon, and that, if the ruling was wrong, the bill should be dismissed with costs for the defendant and such decree should be entered upon the cross bill as justice might require.

*W. G. Thompson*, (*J. W. Lund & G. E. Mears* with him,) for Adams.

*C. K. Cobb*, for the Boston Safe Deposit and Trust Company.

LORING, J. The plaintiff's contention (as we understand it) is that the signature of the defendant below "Extracts from Articles of Association shewing dividend and capital rights of the several Classes of Shares" is a transfer in blank which the plaintiff had a right to complete by writing in above the defendant's signature a proper transfer to itself, as in the case of a negotiable note on the back of which the payee writes his name when he sells the note to another. The argument of the learned counsel for the plaintiff in this connection is that the only reason why the plaintiff has resorted to a court of equity is that there is no room to write in a transfer between the termination of the "Extracts from Articles of Association shewing dividend and capital rights of the several Classes of Shares" and the defendant's signature. The short answer to this contention is that the defendant did not sign his name on the back of the certificate at the end of "Extracts from Articles of Association shewing dividend and capital rights of the several Classes of Shares" as a transfer in blank to be filled in by the plaintiff. That is in effect contradicted by the finding of the judge. The judge found that: "The certificate of stock in question was delivered on June 12, 1913, by the defendant to Gay and Sturgis, brokers, as additional margin to secure the defendant's account. It was signed by the defendant on the back, but no

power of attorney was given by him nor did he comply with the requirements of the English law in regard to transfer as stated in the ninth paragraph of the bill. He expressed to Gay and Sturgis at the time when he deposited the certificate with them a willingness, however, to do so when they so requested. There was no evidence of any such request having been made to him until after the bankruptcy, when the plaintiff made such request." Under these circumstances it is not necessary to consider this contention further.

In the recent case of *Herbert v. Simson*, 220 Mass. 480, it was held that where the delivery of a certificate for shares in the capital stock of a corporation is handed to another without a transfer of the certificate and of the shares represented thereby, a valid gift may be made of that certificate and of those shares. In such a case the donee acquires the equitable title to the shares with a right to compel a formal transfer of the legal title. In view of that decision it must be taken to be settled that when the defendant handed to Gay and Sturgis this certificate for his shares in the Linen Thread Company, Gay and Sturgis became in effect the equitable mortgagees of the shares with the right to call for a transfer of the legal title. Under the findings of the judge, the certificate was handed by the defendant to Gay and Sturgis not because the defendant was then indebted to Gay and Sturgis (for, under the findings, he was not then indebted to them) but because by the contract between a customer and a stockbroker carrying shares for the customer on margin it is the duty of the customer to furnish the broker with a margin for his protection in case of a decline in the price of the stock carried and to enable the broker to borrow the money required to carry the account. In borrowing money a margin is necessary and for that reason and for the protection of the stockbroker the customer has to furnish the broker with securities even though the customer's account is good in the sense that the securities bought are worth more than the purchase money paid for them.

Although no specific finding is made to that effect it must be taken on the judge's report that, on their bankruptcy, Gay and Sturgis ceased to perform their contract of carrying the stocks which they had agreed to carry for the defendant. The judge found specifically that at the time of their bankruptcy Gay and Sturgis were indebted to the defendant irrespective of the certificate here

in question. It follows that at that time the defendant would have been entitled to receive the certificate here in question from Gay and Sturgis if the certificate had been in their hands then. *In re Swift*, 105 Fed. Rep. 493. *Unity Banking & Saving Co. v. Bettman*, 217 U. S. 127.

This brings us to the question whether the intervening pledge by Gay and Sturgis with the plaintiff trust company gives the trust company greater rights against the defendant than Gay and Sturgis would have had had the certificate remained in their hands. What Gay and Sturgis got from the defendant (when the defendant delivered to them without a transfer of it the certificate here in question as margin on his account) was a right in the nature of an equitable mortgage with a right to have the legal title transferred to them so that they would be the apparent owners of the certificate and the shares represented by it and so be in a position (in accordance with the custom) to borrow money in their own name on the strength of the certificate and the shares represented by it without regard to the state of the account between them and the defendant. In place of perfecting their title and so putting themselves in a position to do this, Gay and Sturgis assigned to the plaintiff their unperfected rights in the certificate and the shares represented by it. What they assigned to the plaintiff was something in the nature of an equity or a chose in action. That the plaintiff knew. Or at least it was chargeable with knowledge of that fact by reason of the fact that the certificate and the shares represented by it had not been transferred by the defendant, the owner of it and them. That is to say, what Gay and Sturgis had was an equity or chose in action. All that Gay and Sturgis had to give to the plaintiff trust company was an equity or chose in action.

In case of the assignment of an equity or of a chose in action an assignee gets and can get no greater rights than his assignor had. The plaintiff trust company could have called for a transfer of the certificate and of the shares represented by them. If the defendant was not bound to make a transfer to the plaintiff trust company it was at least bound to make one to Gay and Sturgis to enable them to make a repledge of the certificate independently of the state of the account between them and the defendant. But the trust company did not do so. It



chose to rest content with an assignment of the equitable right or chose in action which Gay and Sturgis had. When Gay and Sturgis became bankrupt it undertook to enforce Gay and Sturgis' equitable right or chose in action. The equitable right of Gay and Sturgis to compel a transfer of the legal title had then come to an end, as we have already held. As assignee of Gay and Sturgis the plaintiff's equitable right was no greater than theirs.

In this case the plaintiff was not misled by the defendant. From the state of the certificate the plaintiff knew or was chargeable with knowledge that the certificate and the shares represented by it had not been assigned by the defendant and that all that it was getting was an equitable right.

We are of opinion, therefore, that the plaintiff trust company has no right to compel the defendant to transfer to it the legal title to this certificate and to the shares represented by it.

The uniform stock transfer act (St. 1910, c. 171) does not apply to this case. This follows from the provision of § 22 as to the meaning of the word "certificate" in that act. See in this connection Braley, J., in *Barstow v. City Trust Co.* 216 Mass. 330, 334. The same result would seem to follow from the provisions of § 23. But although that act does not apply to this case, we are of the opinion that the rule set forth in § 9 is the rule which obtained at common law.\* Under the provisions of that section the same result would follow.

It follows that the ruling of law made by the judge was wrong and that in accordance with the terms of the report a decree should be entered dismissing the bill with costs. It also follows that a decree should be entered on the cross bill directing the trust company to deliver to the defendant the certificate here in question.

*So ordered.*

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\* St. 1910, c. 171, § 9, is as follows: "The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced."

## JOHN PEACH vs. FILIPPO BRUNO &amp; another.

Suffolk. December 1, 1915. — June 21, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, &amp; CARROLL, JJ.

*Agency, Existence of relation.*

Where the owner of a horse and wagon lets them with a driver to carry merchandise from place to place as directed by a servant of the hirer who accompanies the driver for that sole purpose, the driver as matter of law is the servant of the owner of the horse and wagon and not the servant of the hirer.

TORT for damage to the plaintiff's horse, which caused its death, from being run into by a horse of the defendant that was running away owing to the alleged negligence of its driver, who was alleged to have been the agent and servant of the defendant. Writ in the Municipal Court of the City of Boston dated December 5, 1913.

At the trial in the Municipal Court the judge found among others the following facts: "The defendant hired of one Cohen a team consisting of a horse, harness, wagon and driver to assist him in the transportation of certain goods, wares and merchandise. The horse was at all times under the control of the driver furnished by Cohen and was under his guidance and direction at the time of the accident. The defendant's servant and agent was with the team at the time of the accident but simply directing the driver where to obtain the merchandise and where to deliver it. He had nothing whatever to do with driving the horse."

On the facts found by him the judge ruled that there was no evidence of negligence on the part of the defendant.

At the request of the plaintiff the judge reported the case to the Appellate Division, who ordered that the report be dismissed, and the plaintiff appealed.

The case was submitted on briefs.

*E. C. Jenney*, for the plaintiff.

*I. T. Zottoli*, for the defendant Bruno.

LORING, J. This appeal is wholly without merit. Where (as in the case at bar) the defendant hires from another person a horse, wagon and driver to carry merchandise from place to place as di-

rected by the defendant's servant who accompanies the driver for that purpose alone, and nothing more appears, as matter of law the driver is the servant of the owner of the horse and wagon and not of the defendant. Nothing is better settled. The cases are collected in *Shepard v. Jacobs*, 204 Mass. 110.

The cases relied on by the plaintiff (*Boomer v. Wilbur*, 176 Mass. 482, *Woodman v. Metropolitan Railroad*, 149 Mass. 335, and *Thompson v. Lowell, Lawrence & Haverhill Street Railway*, 170 Mass. 577) have nothing to do with this case.

*Order affirmed.*

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PEOPLES NATIONAL BANK vs. ELIZA B. MULHOLLAND & another.

Suffolk. March 6, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Pledge. Mortgage, Of personal property. Trust, Creation.*

Where a bank advanced to an importer of hides the money necessary to pay for a certain shipment of hides and, before advancing the money, received from the importer his promissory note for the sum to be advanced and an instrument in writing called a "trust receipt," which gave a detailed description of the hides then imported and declared that the importer held them in trust for the bank, retaining liberty to manufacture or sell them on account of the bank, and that the bank at any time might take possession of them or of the product manufactured from them or of the proceeds of such of them as should have been sold, it was *held*, that this instrument did not operate as a pledge of the hides, because they never were delivered to the bank, nor did it constitute a mortgage of the hides as against creditors of the importer, because it was not recorded, and that the instrument created no trust in products manufactured from the hides and money received from the sale of a part of them which had been mingled with other products and other money so that they were not susceptible of separation and identification.

BILL IN EQUITY, filed in the Superior Court on February 4, 1913, to enforce an alleged trust in certain hides and the proceeds thereof named in a trust receipt dated March 22, 1910, and signed "E. F. Mulholland Co."

The trust receipt, of which a copy was annexed to the bill, was as follows:

## "Trust Receipt.

Received from the People's National Bank of Roxbury, the following goods and merchandise, their property, specified in the Bill of Lading per Steamer 'Maasstroem,' dated Amsterdam, Mar. 5th, 1910, marked and numbered as follows:

[detailed description]

"Ninety-two bales dry hides.

"and in consideration thereof, we hereby agree to hold said goods in trust for them, and as their property, with liberty to sell the same for their account or to manufacture and re-manufacture the same without cost or expense to them, and we also agree to keep said goods, and the manufactured product and proceeds thereof, whether in the form of money or bills receivable, separate and capable of identification as their property, and hand the proceeds to them to apply against our demand note dated Mar. 22nd, 1910, for seven thousand two hundred three and 70/100 (7203.70) dollars, payable to said Peoples National Bank, and for the payment of any other indebtedness of ours to Peoples National Bank.

"The Peoples National Bank may at any time cancel this trust and take possession of said goods or the manufactured product, or of the proceeds of such of the same as may have then been sold, wherever the said goods or proceeds may then be found, and in the event of any suspension, proceedings in bankruptcy, or failure, or assignment for benefit of creditors, on our part, or of the non-fulfillment of any obligation, or of the non-payment at maturity of any acceptance or note made by us, or any obligation of ours to the People's National Bank, on our account or of any indebtedness on our part, all obligations, acceptances, indebtedness and liabilities whatsoever shall thereupon (with or without notice) at their option mature and become due and payable. The said goods and the manufactured product thereof, while in our hands shall be fully insured against loss by fire, and the insurance money received for any loss shall be subject to the trust herein contained in the same manner as the goods themselves."

The case was heard by *Morton, J.*, upon a master's report. The facts found by the master are stated in the opinion. The judge ruled as matter of law that in view of the findings of the master and the inferences to be drawn therefrom the deposits and leather

in question were identified sufficiently to impress them with the trust alleged in the bill. He made a final decree confirming the master's report and ordering that the debt owed to the plaintiff by the firm of E. F. Mulholland and Company, composed of the defendant Mulholland and the late Cornelius J. Coughlin, was established in the sum of \$4,540.57 with interest at the rate of six per cent per annum from October 1, 1911, amounting on December 18, 1915, to \$5,688.51, that the defendant Coughlin as administratrix of the estate of Cornelius J. Coughlin had in her possession and control the sum of \$2,241.22 and the sum of \$997.59 (with any interest accumulated thereon since the deposit of those funds in the Federal Trust Company) as the proceeds of the property of the plaintiff described in the trust receipt together with ten thousand four hundred and fifty-two feet of black ooze calf leather, also the proceeds of the plaintiff's property described in the trust receipt, that such money and leather were the property of the plaintiff and that the defendant Coughlin as administratrix forthwith should pay and deliver such money and leather to the plaintiff to be applied in reduction of the debt due to it from the firm of E. F. Mulholland and Company.

And it further was ordered "That the defendant Mulholland pay unto the plaintiff the aforesaid sum of \$5,688.51, with interest thereon, subject to a credit to be allowed of the amount paid to the plaintiff, together with that realized from the aforesaid leather, and let execution issue therefor. The defendants are hereby directed to pay the plaintiff its costs, amounting to \$24.96, and execution is to issue therefor."

The defendant Coughlin, administratrix, appealed from the decree.

*W. J. Cusick*, for the defendant Coughlin.

*Lee M. Friedman*, for the plaintiff.

PIERCE, J. Before the summer of 1911 the defendant Mulholland and one Cornelius J. Coughlin were copartners under the name and style of E. F. Mulholland and Company, and were engaged in the business of importing hides which they either sold in the raw state or had them tanned into leather and then sold. In the summer of 1911 the copartnership was dissolved, and thereafter Coughlin continued the business until his death on September 24, 1911. The defendant Ellen T. Coughlin was appointed

the administratrix of his estate, which has been represented insolvent.

On March 22, 1910, the firm received from one S. G. Kaufman of Germany a bill of lading with a draft for the delivery upon payment of ninety-two bales of hides. Coughlin, on behalf of the firm, arranged with the plaintiff to furnish the money to pay the draft. Before the payment was made, Coughlin executed and delivered to the plaintiff the collateral promissory note of the firm for the amount of the draft. With the delivery of the note he also delivered a trust receipt of the firm, in the form set out in the bill.

At the time of Coughlin's death, the skins described in the trust receipt had either been sold or tanned into leather. The skins that remained unsold and the money received from those sold were so mixed with other skins and money of the firm as to render them not susceptible of separation and identification. The question is whether this fund (money and leather) should be awarded to the bank upon its claim under the trust receipt.

There are no facts found by the master to warrant a finding or inference of fact that the plaintiff purchased the hides of Kaufman on behalf of the firm, that it took title to itself as security for its advancement or that it received the bill of lading and draft as agent for the seller. The case at bar is, therefore, not within or governed by *Stollenwerck v. Thacher*, 115 Mass. 224, *Fifth National Bank of Chicago v. Bayley*, 115 Mass. 228, *Newcomb v. Boston & Lowell Railroad*, 115 Mass. 230, *Moors v. Wyman*, 146 Mass. 60, *Moors v. Bird*, 190 Mass. 400, *Roland M. Baker Co. v. Brown*, 214 Mass. 196.

With the payment of the draft the legal title to the hides passed from the seller to the firm. The trust receipt, before the passing of the title to the firm, was inoperative to vest any legal title in the plaintiff, or after the passing of title to the firm to deprive it of title. It could not operate as a pledge, because the plaintiff never had possession of the hides and because the firm had and retained possession to manage and use them as collateral security for its debt to the plaintiff. *Walker v. Staples*, 5 Allen, 34. *Thompson v. Dolliver*, 132 Mass. 103. *Copeland v. Barnes*, 147 Mass. 388. *Harding v. Eldridge*, 186 Mass. 39. *Gamson v. Pritchard*, 210 Mass. 296.

If the trust receipt was valid as a mortgage as between the plaintiff and the firm, it was nevertheless invalid as against the creditors of Coughlin's insolvent estate because it was not recorded, and because by the express terms of the statute "Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto." R. L. c. 198, § 1. *Goodrich v. Dore*, 194 Mass. 493. See *Harrison v. J. J. Warren Co.* 183 Mass. 123; *Wall v. Provident Institution for Savings*, 6 Allen, 320; *Parker v. Flagg*, 127 Mass. 28.

It follows that the decree must be reversed in so far as it establishes a trust upon the money and leather in the possession of the administratrix, and must be modified by striking out so much thereof as provides for the allowance to the defendant Mulholland of a credit arising from the payment to the plaintiff of the money and leather charged with a trust in the decree.

*Decree accordingly.*

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JAYME M. D'ALMEIDA, administrator, vs. BOSTON AND MAINE RAILROAD.

Middlesex. March 7, 8, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Estoppel. Negligence, Causing death. Joint Tortfeasors. Judgment. Execution, Satisfaction of. Damages, Against joint tortfeasors.*

Where an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, under both of which statutes the damages are to be assessed with reference to the degree of culpability of the defendant, there was evidence that the death in question was caused by the concurring negligence of both corporations and the presiding judge instructed the jury that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction. The plaintiff did not object to this instruction and verdicts were returned against both defendants, on each of which judgment was entered and execution issued. *Held*, that, if before the trial the plaintiff was entitled to have the action against each defendant for negligently causing the death of his intestate decided upon its own merits without regard to the fact that another action was pending against another defendant based upon the

same facts, on which no opinion was expressed, the plaintiff, having acquiesced in the submission of the cases to the jury under the instruction quoted above, was estopped from collecting more than one judgment. An estoppel may be established by proof of silence when there was a duty to speak.

LORING, J. This was an action under St. 1907, c. 392, to recover a penalty for negligently causing the death of the plaintiff's intestate. It came on for trial (1) with another action against this defendant brought to recover compensation for conscious suffering of the plaintiff's intestate and (2) with an action against the Boott Mills brought (under St. 1909, c. 514, § 127, cl. 2; § 128,) both to recover a penalty for negligently causing the intestate's death and damages for his conscious suffering. In the course of the trial a doubt occurred to the presiding judge \* whether the plaintiff would be entitled to more than one satisfaction in case he obtained a judgment against each defendant for a penal sum (on the ground that the negligent act of each defendant was a concurrent cause of the death of the plaintiff's intestate) and that what he said to the jury on that matter "would probably affect the amount of the verdicts." Thereupon he conferred with counsel and said to them that he thought there could be but one satisfaction "and they assented to that view." The judge then suggested that the counsel should make a stipulation covering that point. They assented to that. Later a stipulation was submitted by counsel for the mill corporation to counsel for the railroad; the counsel for the railroad "objected to the form prepared" by the counsel for the mill corporation and no written stipulation was made.

In his charge to the jury the presiding judge said: "As counsel have said, if you should bring in verdicts for the plaintiff both against the Boott Mills and against the Boston and Maine Railroad and those verdicts stood and went to judgment, the plaintiff would not be permitted to recover [collect] judgments in both cases. In such case, if there was any difference in your verdicts; — if you made any difference — if you gave a larger verdict in one case than you did in another, it may be very natural to suppose that he would content himself with the larger judgment and let the other go, but he could not recover [collect] both, and that is important for you to know, but you will treat each case as a case by itself and con-

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\* Fox, J.



sider what, if anything, the plaintiff ought to recover as to that particular defendant, and having in mind the fact that in this class of cases it is conceivable that each of two different persons may have been at fault and each of two different persons may be therefore responsible to the plaintiff." No exception was taken to this part of the charge by any of the counsel.

In the action against the mill corporation the plaintiff obtained a verdict of \$200 on the count for conscious suffering and a verdict of \$3,300 on the count for negligently causing the death of the intestate. In the action against the railroad corporation for conscious suffering the jury returned a verdict for \$200, and in the other action against the railroad corporation (namely, the action for negligently causing the death of the intestate) the plaintiff obtained a verdict for \$6,300. Judgments were entered on these verdicts and executions were taken out on the judgments so entered. On the execution against the mill corporation the plaintiff collected the full amount of the judgment. On the execution against the railroad corporation taken out on the judgment in the action for conscious suffering, the plaintiff collected from the defendant its costs, and returned the execution to court with an indorsement upon it in which it was stated that the full amount of the judgment for conscious suffering in the action against the mill corporation having been collected by him the plaintiff was not authorized to collect anything more on this execution. An indorsement was made upon the execution taken out in the action against the railroad corporation for negligently causing the death of the intestate, which stated that the plaintiff had received from the defendant \$128.32, being the amount due for costs and interest, and the "sum of \$3,092.49 for damages" and having received from the mill corporation the full amount of the judgment against it "and being of opinion that, in view of the opinion of the Supreme Judicial Court in these cases, we are not authorized to proceed further in the collection of this execution, we hereby return the same to court." Acting upon what was said *obiter* by this court in *Boott Mills v. Boston & Maine Railroad*, 218 Mass. 582, 592, the plaintiff took out an *alias* execution, whereupon the defendant pursuant to the decision of this court in *Boston & Maine Railroad v. D'Almeida*, 221 Mass. 380, made a motion that the original cause be brought forward and that the *alias* execution be set aside.

The facts stated above were found by the judge on this motion. On these facts the judge made this ruling: "I adhere to my original ruling that there can be but one satisfaction, and rule as a matter of law that the motion should be allowed." Thereupon he reported the case to this court.

We do not find it necessary to pass upon the ruling of law made by the judge because we are of opinion that under the circumstances the plaintiff is estopped to collect more than one judgment.

It may be true that the plaintiff was entitled to have each action against each defendant for negligently causing the intestate's death decided upon its own merits without regard to the fact that another action was pending against another defendant based upon the same facts. Upon this point we express no opinion. By the terms of the statute the amount of the penalty imposed upon a defendant (which enures to the benefit of those whom the plaintiff represents) depends in each case upon the degree of culpability upon the part of the particular defendant in each action and in no way depends upon the fact that there is another defendant also liable to pay a similar penalty for negligently causing the intestate's death, even though the negligent act of the other defendant was a cause of the death concurrent with the negligent act of the defendant in the action in question. But the plaintiff did not ask that the case should be left to the jury on these terms. On the contrary, when the judge told the jury that it "is important for you to know" that there can be but one satisfaction, the plaintiff chose to take his chances as to the amount of the verdict or verdicts which he would obtain (if he obtained a verdict or more than one verdict) under that statement of the presiding judge.

When a jury is told that there can be but one satisfaction and that it is important that they should know that fact in determining the amount of the verdicts which they are to render it is more than likely that the amount of the verdicts actually rendered was influenced by that instruction of the presiding judge. The plaintiff chose to take verdicts, the amount of which must be taken to have been influenced (or at least it is likely that they were influenced) by these considerations. It follows that he is estopped to collect both judgments. See in this connection *Lincoln v. Lincoln*, 12 Gray, 45; *Lilley v. Adams*, 108 Mass. 50; *Cornwall v. Davis*, 38 Fed. Rep. 878; *Galt v. Provan*, 131 Iowa, 277; *Ault v. Bradley*, 191 Mo. 709.

The plaintiff has argued that there is no estoppel in the case at bar because there can be no estoppel unless there has been a representation of an existing fact made by the plaintiff, meaning, as we understand his argument, that the plaintiff must have made a statement by word of mouth. It is rather hard to make that contention in view of the fact that in the leading case on estoppel *in pais*, (*Pickard v. Sears*, 6 Ad. & El. 469,) it was held that an estoppel can be made out by silence when there is a duty to speak. That proposition, and the case of *Pickard v. Sears* as authority for that proposition, have been abundantly established in this Commonwealth. The reason why there are no recent cases on the point is because no doubt about the point remained after the cases of *Dewey v. Field*, 4 Met. 381, *Cartwright v. Bate*, 1 Allen, 514, *Fowler v. Parsons*, 143 Mass. 401, *Brewer v. Boston & Worcester Railroad*, 5 Met. 478, 483, *Audenried v. Betteley*, 5 Allen, 382, 384, *Bragg v. Boston & Worcester Railroad*, 9 Allen, 54, 61, *Fall River National Bank v. Buffington*, 97 Mass. 498, 501. There is nothing to the contrary in *Jackson v. Allen*, 120 Mass. 64, 79, *Stiff v. Ashton*, 155 Mass. 130, *Lincoln v. Gay*, 164 Mass. 537, *Nourse v. Nourse*, 116 Mass. 101.

It follows that the motion of the defendant to set aside the *alias* execution must be granted.

So ordered.

*S. E. Qua*, (*F. W. Qua* with him,) for the plaintiff.

*F. N. Wier & J. M. O'Donoghue*, for the defendant, were not called upon.

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LOUIS K. LIGGETT COMPANY *vs.* HARRY A. WILSON  
& another.

Suffolk. March 9, 10, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Landlord and Tenant. Contract, Construction.*

A lease, manifestly drawn by a person who did not appreciate the meaning of the legal terms that he tried to use, contained the following paragraph: "Conditioned that in case of nonpayment of the rent at the time and in the manner above

provided, or should the Lessee be declared a bankrupt or make an assignment for the benefit of his creditors, or if default shall be made in any of the covenants or agreements herein contained, the said Lessor shall have the right, without notice, to enter the said premises either by force or otherwise, and to again repossess the same, and to relet the said premises as the agent of the said Lessee, and to receive the rents due by these presents, and holding the said Lessee liable for any deficiency, it being understood that neither this nor any other action on the part of the Lessor shall in any wise deprive said Lessor of its full legal rights against the Lessee because of any unpaid rentals under the terms of this lease." The lessee was declared a bankrupt, and the lessor, to whom the keys of the leased premises were delivered, "took possession of said premises under the terms of said lease." *Held*, that under the true construction of the paragraph quoted above the entry and taking possession by the lessor terminated the lease.

CONTRACT on a contract in writing by which the defendants agreed to guarantee the punctual performance by the Francis Wilson, Inc., a corporation, of all the covenants and agreements of that corporation as the lessee under a lease from the plaintiff dated April 14, 1913, seeking to recover \$583.33 with interest thereon from November 30, 1914, as the amount of rent due under that lease for the month of November, 1914. Writ in the Municipal Court of the City of Boston dated December 4, 1914.

In the Municipal Court the trial judge made the findings that are stated in the opinion and the footnotes and made a general finding for the plaintiff in the sum claimed.

At the request of the defendants the judge reported the case to the Appellate Division, who made an order that the report be dismissed. The defendants appealed.

*H. G. Allen & H. W. Conant*, for the defendants, submitted a brief.

*G. G. Bacon*, for the plaintiff.

LORING, J. The lease here in question manifestly is drawn by one who did not appreciate the meaning of the legal terms which he used, or, speaking with more accuracy, which he attempted to use. For the difficulty which we have in construing the lease arises from the fact that the person who drew it did no more than make an attempt at using legal terms. The lease is badly drawn and no construction can be given to it which is not open to question.

Before undertaking to determine the true construction of the lease in question, it is well to have a clear understanding of the clauses found in leases which evidently are the foundation of

the clause here in question and of the purposes for which those clauses are adopted.

Where a lessee becomes bankrupt (or otherwise unable to meet his obligations) unless some clause providing for the contingency is inserted in the lease the lessee continues to be the owner of the term created by the lease and all that the lessor can get is such dividend on the amount of the rent as the bankrupt lessee can pay. To protect the landlord against that contingency it is not uncommon to insert in leases a clause providing (1) that the leasehold estate shall be conditioned upon the lessee not becoming bankrupt (or otherwise unable to pay his debts) and (2) that if the lessee does become bankrupt (or otherwise unable to pay his debts) the lessor may enter and end the leasehold estate for condition broken. If the contingency arises and the lessor does enter and end the leasehold estate, the loss to the lessor mentioned above is avoided.

The terms of the condition authorizing the lessor to re-enter and end the leasehold estate (in case the lessee becomes bankrupt or otherwise unable to pay his debts) usually inserted in leases in this Commonwealth, are in substance these: The lease is made on condition that if the lessee fails to perform any of the covenants or be declared bankrupt or insolvent, or if an assignment be made of the lessee's property, or if this leasehold interest shall be taken on execution, then the lessor or lessors may "terminate this lease, enter upon the said premises and, expelling the Lessee and removing its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any rights or remedies hereunder, repossess the same as of his or their former estate." This, for example, was the form of the right of re-entry in the lease in question in *Woodbury v. Sparrell Print*, 187 Mass. 426, and in the lease in question in *Cotting v. Hooper, Lewis & Co. Inc.* 220 Mass. 273.

But it was found in practice that when a lessor to protect himself against this loss was forced to enter and end the leasehold estate, he might not be able to let the estate for as large a rent as that reserved in the lease and so lost the benefit of the bargain which the lease gave him. In recent years it has been not uncommon for parties to insert in leases a clause to protect the landlord against the loss of his bargain under such circumstances. For

example: In the lease in question in *Woodbury v. Sparrell Print, ubi supra*, it was provided that on such termination of the lease: "The Lessee shall be liable to the Lessor for all loss and damage sustained by the Lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved." Another covenant to protect the landlord in such a contingency is that found in the lease in question in *Cotting v. Hooper, Lewis & Co. Inc., ubi supra*. The covenant in that case was that the lessee would indemnify the lessor (as in *Woodbury v. Sparrell Print, ubi supra*) "or, at the election of the Lessors the Lessee will, upon such termination, pay to the Lessors as damages, such sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named." A third covenant of this kind is that found in the lease in question in *Weeks v. International Trust Co.* 125 Fed. Rep. 370. The clause in the lease in question in that case required the lessee to pay to the lessor, during the term for which the lease originally was to have run, the difference between the rent reserved in the lease and the amount received by the lessor on reletting the premises at the lessee's risk.

In the case at bar the trial judge found that on the keys being delivered to the lessor on or about November 18, 1914, he "took possession of said premises under the terms of said lease."

The plaintiff's contention is that by taking possession on November 18 under the terms of the lease he did not terminate the leasehold estate created by the lease.

In support of this contention he argues that the provision found in the clause of the lease here in question \* does not provide in

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\* "Conditioned that in case of nonpayment of the rent at the time and in the manner above provided, or should the Lessee be declared a bankrupt or make an assignment for the benefit of his creditors, or if default shall be made in any of the covenants or agreements herein contained, the said Lessor shall have the right, without notice, to enter the said premises either by force or otherwise, and to again repossess the same, and to relet the said premises as the agent of the said Lessee, and to receive the rents due by these presents, and holding the said Lessee liable for any deficiency, it being understood that neither this nor any other action on the part of the Lessor shall in any wise deprive said Lessor of its full legal rights against the Lessee because of any unpaid rentals under the terms of this lease."

terms that upon the lessor entering the term shall come to an end. Nor that when he does "repossess the same" he shall repossess the same as of his former estate. On the contrary it provides that upon repossessing the same he should have the right "to relet the said premises as the agent of the said Lessee, and to receive the rents due by these presents" and after that it is provided, "it being understood that neither this nor any other action on the part of the Lessor shall in any wise deprive said Lessor of its full legal rights against the Lessee because of any unpaid rentals under the terms of this lease."

We do not think that the last clause is important. It is usual to insert such a clause in leases to make sure as a matter of precaution that when a lessor enters and terminates a lease he does not lose his right to the rents which had theretofore accrued. In the lease in question in *Cotting v. Hooper, Lewis & Co. Inc.*, *ubi supra*, the clause inserted for that purpose was, "without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant." Seemingly this clause was taken from such a clause in leases. We are of opinion that this clause in the lease here in question should not be construed to have any other or different effect.

The objection to the construction urged by the plaintiff is that if it is the true construction of this clause the clause is altogether futile. If all that this clause gives to the lessor is a right (in case the lessee becomes a bankrupt or makes an assignment for the benefit of his creditors, etc.) to take possession of the premises as agent of the lessee and relet them on the lessee's account, it might as well have been left out of the lease. If that is the true construction of the lease, all that the lessor is entitled to, in case he enters under this clause and relets the premises, is to recover what he can for the rent due him from the original lessee. The rents due from the subtenant in such a case would belong to the original lessee and not to the lessor. If the effect of the entry by the lessor does not put an end to the tenant's leasehold estate it is hardly conceivable that the parties would have inserted this clause in the lease. More than that this whole clause begins with the word "Conditioned." It is a clause making the leasehold estate created by the lease a conditional term. It is true that it does not in terms state that the lease shall be terminated if the

condition takes place and an entry is made by the lessor for condition broken. But that goes with the fact that the clause creates a condition. It is also true that this clause provides that the lessor upon entering shall have a right "to again repossess the same." The usual clause as already stated is, that the lessor shall have a right to "repossess the same as of his former estate." It is to be observed that the clause does not provide that the lessor shall have the right to "repossess the same" as agent of the lessee. The right given is to "repossess the same." When the lessor has repossessed the same then he is given the right "to relet the said premises as agent of the said Lessee."

Having in mind the futility of the clause if it is construed as the plaintiff contends, and having in mind that the clause is a clause which made the tenant's leasehold estate a conditional one, we are of opinion that by its true construction when the lessor exercised the right given him of entering and repossessing himself of the same, it must be construed to mean that when the lessor entered under the clause he repossessed himself of the premises as of his former estate.

The other provision to be dealt with in construing this clause of the lease is the provision that upon entering the lessor shall have a right "to relet the said premises as the agent of said Lessee, and to receive the rents due by these presents, and holding the said Lessee liable for any deficiency." On its face this would seem to be a clause like that in *Weeks v. International Trust Co.*, *ubi supra*, and to provide that each month during the remainder of the term which would otherwise have continued in existence, the lessor may recover from the lessee the difference between the amount named as rent in the lease and the sum for which the premises have been let at the lessee's risk for that month.

Apparently the defendants, who guaranteed the due performance of the covenants and agreements of the lease, are pecuniarily able to respond, and for that reason it is now for the interest of the plaintiff in the case at bar to contend that the lease here in question has not come to an end. But that was not the situation when the lease was made. If that had been the situation at that time there would have been no occasion for inserting in the lease the clause here in question. More than that, if the lessor had been content to rely solely on the responsibility of the guarantors when



the lessee made an assignment for the benefit of its creditors, it would not have entered under this clause of the lease. It is manifest that this clause was inserted in the lease and the entry under it was made by the lessor (the plaintiff) to obtain security in addition to that given by the defendants' guaranty. The lease and the plaintiff's action must be construed in the light of the events which obtained when the lease was drawn and the entry was made.

We are of opinion that the leasehold estate came to an end when the keys were delivered to the lessor on November 18, 1914. It follows that the plaintiff was not entitled to recover rent for the month of November. The declaration in the case at bar is a declaration to recover rent and not a declaration to recover a sum of money equal in amount to the rent less such sum as the lessor had received on reletting the premises.

The whole lease is not before us. We do not know whether it contains a covenant which would enable the lessor to recover rent for the portion of the month of November which had expired before the keys were surrendered on November 18. This question was not dealt with at the argument. Under these circumstances we are of opinion that the case should stand for further proceedings in the Municipal Court in spite of the finding made by the trial judge,\* which would seem to justify a recovery under some form of pleading of the sum found to be due.

The entry must be: Order dismissing appeal must be reversed. The case to stand for further proceedings in the Municipal Court.

*So ordered.*

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\* The judge found: "4. That Louis K. Liggett Company, the Lessor, after having re-possessed the premises on or about November 18, 1914, has made reasonable effort in the interest of the Lessee as well as its own, to obtain a new tenant and has to date been unsuccessful."

BOARD OF SURVEY OF ARLINGTON vs. BAY STATE STREET  
RAILWAY COMPANY.

Middlesex. March 20, 1916. — June 21, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Street Railway. Public Service Commission. Municipal Corporations, Officers and agents. Estoppel.*

In granting locations for street railways, the appropriate boards of towns and cities are public officers and not agents of their respective municipalities.

The Legislature has the power to change or to abrogate, to the loss of the municipalities, the terms and conditions contained in locations granted to street railway companies by the appropriate boards of towns and cities, although such grants of locations are phrased in the form of contracts and secure valuable financial obligations to the municipalities.

Under the provisions of St. 1913, c. 784, §§ 17, 19-22, 29, the public service commission have power to grant a petition by a street railway corporation to increase its rate of fare between certain adjoining towns so that it shall exceed five cents, although such increase is in abrogation of a condition or contract contained in a grant of a location to the corporation by the selectmen of one of the towns in 1897 to the effect that the fare charged for transportation between any point in that town and any point in the town adjoining never shall exceed five cents.

It was not necessary in the present case to determine *whether*, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon.

By the enactment of the above named statute the Legislature waived whatever conditions or contracts were made by the appropriate municipal boards, who were public officers, and the street railway corporations in the granting and accepting of the locations, and therefore street railway corporations are not estopped from seeking from the public service commission permission to establish fares which are in excess of those agreed upon in such conditions or contracts.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 6, 1915, by the members of the board of survey of the town of Arlington, who under St. 1904, c. 3, § 5, succeeded to the duties of the board of selectmen, among other things, in matters affecting street railways.

The defendant demurred, and the case was reserved by *Braley, J.*, for determination by this court.

St. 1913, c. 784, §§ 17, 19-22, 29, referred to in the opinion, are as follows:

"Section 17. All charges made, demanded or received by any

common carrier subject to the supervision of the commission for any service rendered or performed, or to be rendered or performed by it or in connection therewith in the conduct of its common carrier business, or made, demanded or received by any two or more common carriers joining in rendering or performing any service shall be just and reasonable, and every such common carrier and any two or more such common carriers joining in rendering or performing any service shall be entitled to make, demand and receive just and reasonable charges for any such service, and every unjust or unreasonable charge is hereby prohibited and declared unlawful; but charges heretofore established and set out in any schedule filed as hereinafter provided shall be deemed *prima facie* lawful until changed or modified by the commission under the powers conferred upon the commission by the provisions of this act, but this provision shall not give to such rates any greater weight as evidence of the reasonableness of other rates than they would otherwise have."

"Section 19. Subject to the powers of the commission to regulate and prescribe rates and charges, a common carrier may make commodity, transit, or other classes of rates. The furnishing by any common carrier of any service at the rates and upon the terms and conditions provided for in any existing contract executed prior to the first day of July, nineteen hundred and thirteen, shall not constitute a discrimination unless the commission shall so determine. The commission shall not be prevented from taking such action as it may deem proper by any commitment or agreement of a common carrier entered into by reason of any requirement or recommendation of any board of public officers acting under delegated authority from the General Court prior to the enactment hereof. Unless the commission shall determine otherwise common carriers shall be permitted, whether required to do so by law or not, to issue mileage, workingmen's, excursion, school, or commutation passenger tickets, or reduced rate tickets for the transportation of children under twelve years of age, or of pupils attending schools, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of five hundred miles or more. All season tickets, before issuance, shall be subject to the approval of the commission as to the form thereof and the conditions named therein.

"Section 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the Commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the commission may order. In the case of common carriers the forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carriers shall, except as otherwise provided in this act, charge, demand, exact, receive or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified, or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be given prior to the time, fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when

any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: provided, however, that when any such contract or contracts are or become terminable by notice, the commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto, and thereupon such contract or contracts shall be terminated by such telegraph or telephone corporation as and when directed by such order.

“Section 21. Whenever the commission receives notice of any change or changes proposed to be made in any schedule filed under the provisions of this act, it shall have power, either upon complaint or upon its own motion, and after notice, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. Pending any such investigation and the decision thereon, the commission shall have power, by any order served upon the common carrier affected, to suspend the taking effect of such change or changes, but not for a longer period than six months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, the commission may make such order in reference to any new rate, joint rate, fare, telephone rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, as would be proper in a proceeding initiated after the same has taken effect. At any such hearing involving any proposed increase in any rate, joint rate, fare, telephone rental, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the common carrier. If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the commission that the said rate, joint rate, fare, telephone rental, toll or charge is insuffi-

cient to yield reasonable compensation for the service rendered, the commission shall have power to determine what will be the just and reasonable rate or rates, fare or fares, telephone rental or rentals, toll or tolls, charge or charges, to be thereafter observed in such case as the minimum to be charged and to make an order that the common carrier complained of shall not thereafter demand, charge or collect any rate, fare, telephone rental, toll, or charge lower than the minimum so prescribed without first obtaining the consent of the commission, not to be given without a public hearing.

"Section 22. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges of any of them demanded, exacted, charged or collected by any common carrier now or hereafter subject to its jurisdiction, for any services to be performed within the Commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, or that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. It shall be the duty of every such common carrier to observe and obey every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The commission may, after investigation, authorize a common carrier in special cases to charge less for longer than for shorter distances for the transportation of passengers or property, whenever in the opinion of the commission such authorization is consistent with the public interests, and the commission may from time to time modify or revoke such authorization."

"Section 29. This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the commission any

jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission are hereby repealed: provided, that nothing herein contained shall be construed to repeal, directly or by implication, the provisions of chapter five hundred of the acts of the year eighteen hundred and ninety-seven, or to authorize the commission to make any order or take any action inconsistent with the provisions of said act or with any rights which have been acquired by any common carrier under any statute prior to the passage of this act."

The case was submitted on briefs.

*P. A. Hendrick*, for the plaintiffs.

*J. F. Jackson & S. E. Wardwell*, for the defendant.

RUGG, C. J. One of the clauses in the original location granted by the selectmen of the town of Arlington in 1897 to the Arlington and Winchester Street Railway Company, to whose rights, privileges and obligations the defendant has succeeded, was to the effect that "The rate of fare shall not exceed 5 cents from any point in Arlington to any point in Arlington or Winchester, or from any point in Winchester to any point in Arlington, on all lines now or in the future controlled or operated by said Company or by any Company or system of which said road may in the future form a part." The defendant, under the authority of St. 1913, c. 784, §§ 17, 19-22, 29, proposes to raise the rate of fare above five cents, subject to the approval of the public service commission. This suit in equity is brought to enjoin such action by the railway company.

The location here in question having been an original location granted by the selectmen and accepted by the directors of the street railway company before St. 1898, c. 578, took effect, the regulation of fares by agreement as a condition in the grant of the location was within the power conferred by the then existing statute upon the selectmen, and bound the street railway company to the same extent as if inserted in a special charter of incorporation. *Selectmen of Clinton v. Worcester Consolidated Street Railway*, 199 Mass. 279. *Selectmen of Westwood v. Dedham & Franklin*

*Street Railway*, 209 Mass. 213. In granting locations for street railways, boards of selectmen and boards of aldermen are public officers and not agents of their respective towns and cities. The State exerts its sovereign power through them as its instruments. *Flood v. Leahy*, 183 Mass. 232. The Legislature has the power, so far as concerns these public officers and the municipalities by whom they were elected, to change or abrogate the terms of such locations. Although phrased in the form of a contract and securing valuable financial obligations to the cities and towns, the power of the Legislature to modify to their loss such locations has been settled after great consideration and vigorous protest from the interested municipalities. *Springfield v. Springfield Street Railway*, 182 Mass. 41. *Worcester v. Worcester Consolidated Street Railway*, 182 Mass. 49; S. C. affirmed in 196 U. S. 539. See also *Southern Wisconsin Railway v. Madison*, 240 U. S. 457. Regulation of fares in this respect stands on no higher ground than requirements as to paving of streets. The paramount power of the Legislature over the subject of fares was recognized expressly in *Selectmen of Clinton v. Worcester Consolidated Street Railway*, 199 Mass. 279, at page 288.

The question, therefore, is reduced to one of statutory interpretation. It is whether the general control over fares has been vested in the public service commission by St. 1913, c. 784. That act marked a radical change in the policy of the Legislature in the regulation of street railways. It conferred upon the public service commission far greater powers over the operation and accommodations to be provided by such common carriers than had been vested in any board by earlier acts. Summarily stated, it clothed the commission with full power to require safe, reasonable and adequate service to the public from all common carriers. The authority of the commission as to supervision and regulation in other respects is ample. It is manifest that such broad powers justly cannot be exercised to the extent conferred by the words used except when joined either with equally full power to regulate charges, rates and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required. This power expressly is conferred by § 22, which after subjecting the rates and fares actually charged or demanded to their supervision, enacts that whenever the commis-



sion is of opinion "that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged" and shall fix the same by order binding upon the carrier. That these words were intended to be interpreted according to their full natural scope is obvious from the provision of § 29, to the effect that, "This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission are hereby repealed." It is impossible to give the act a narrow or constricted construction as to the subject of fares.

There is no room for the binding force of stipulations as to fares in original grants of locations by local boards in the face of these sweeping provisions. Such stipulations are extinguished so far as inconsistent with the terms of St. 1913, c. 784. The plain purpose of the Legislature, in recognition of the fact that many street railways operate miles of tracks extending through numerous cities and towns, was to prescribe for the regulation of fares throughout the Commonwealth by a single public board, which may be expected to act with a broad and unbiased view for the promotion of the common good of all the conflicting interests involved and not under the influence of purely local considerations. The statute is a legislative determination that it is unwise and inexpedient longer to permit the full development of interurban transportation by street railways to be hampered by conditions as to fares contained in locations granted by the public officers of different municipalities. This conclusion is confirmed by the provisions of § 19, to the effect that "The commission shall not be prevented from taking such action as it may deem proper by any commitment or agreement of a common carrier entered into by reason of any requirement or recommendation of any board or public

officers acting under delegated authority from the General Court prior to the enactment hereof." See *Keefe v. Lexington & Boston Street Railway*, 185 Mass. 183.

It is not necessary to determine what would be the effect of a reduction of fares against the protest of the street railway company below the rate fixed in the location.

This record simply presents a case where the original act of the State performed by the selectmen in granting a location to the street railway company has been modified in respect of fares by the State speaking through the paramount power of the Legislature, and that modification has been accepted by the street railway company. No one else can complain.

No question of estoppel arises on this record. The State acting through its Legislature in enacting the statute has waived in this respect, in view of the adoption of its present policy as to fares, whatever conditions the State acting through the selectmen had imposed in the public interests in the original location. Hence cases like *Rutherford v. Hudson River Traction Co.* 44 Vroom, 227, and *People v. Suburban Railway*, 178 Ill. 594, upon which dependence is placed by the plaintiffs, have no application.

The plaintiffs rely strongly on *Detroit v. Detroit Citizens' Street Railway*, 184 U. S. 368. The irrelevancy of that decision to the facts here presented is demonstrated by *Worcester v. Worcester Consolidated Street Railway*, 196 U. S. 539.

While the public policy and statutory history of other States may be so different from that of this Commonwealth that decisions of other jurisdictions are by no means controlling, the conclusion here reached is in harmony with the reasoning of numerous cases. *Milwaukee Electric Railway & Light Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174. *Duluth Street Railway v. Railroad Commission*, 161 Wis. 245. *Bennet v. Public Service Commission*, 75 W. Va. 127. *Public Service Electric Co. v. Public Utility Commissioners*, 2 Gummere, 128.

It follows that the subject of fares (with express and possible exceptions not here material) has been placed under the control of the public service commission. Its power is not restrained on the facts here disclosed by the condition in the original grant of location.

*Bill dismissed.*

MAY A. BOOTH vs. SYLVESTER W. MEAGHER & another.

Plymouth. March 22, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, In use of highway, In operation of automobile.*

At the trial of a suit by a woman sixty-one years of age against one who, while operating an automobile, ran into the plaintiff, there was evidence that the plaintiff was a little deaf, that she had been walking from her home to church on a misty, rainy evening in March on her left hand side of the street because the sidewalk was muddy, that she then had crossed the street diagonally to the right hand side, that she thought there was an automobile about fifty feet from her as she neared that curb, that, perceiving that the sidewalk on that side also was muddy, she continued walking in the street for five or six steps, when she was struck from behind by the automobile, that the automobile had strong headlights and that there was nothing to prevent the defendant from seeing the plaintiff. *Held*, that under the circumstances the plaintiff had a right to walk in the roadway and that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury.

One travelling on foot in the evening on a public way may be found to have been in the exercise of due care when walking in the roadway because the sidewalk was muddy.

BILL IN EQUITY, under R. L. c. 159, § 3, cl. 7, as amended by St. 1910, c. 531, § 2, filed in the Superior Court on October 10, 1912, against Sylvester W. Meagher, hereinafter called the principal defendant, and the Independent Die Company, a corporation, in which the plaintiff set forth a claim in tort for damages for personal injuries received in Brockton on March 19, 1911, under the circumstances described in the opinion, also alleged that the principal defendant owned shares of the capital stock of the defendant corporation and that the corporation had in its possession money belonging to the principal defendant; and prayed that the principal defendant might be adjudged liable to her for her injuries, that the amount of her damages might be determined, that judgment therefor might be entered, that an execution might be issued and that the principal defendant's shares of the capital stock of the defendant corporation and the money in its possession

belonging to him, so far as necessary to satisfy the execution, might be turned over to the plaintiff.

No question was raised as to the pleadings.

Issues for a jury were framed and were allowed, and the case was tried before *Irwin, J.* The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the principal defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

*R. W. Nutter*, for the plaintiff.

*W. J. Coughlan & D. R. Coughlin*, for the principal defendant.

*Rugg, C. J.* The plaintiff seeks to recover damages for personal injuries sustained by her while a pedestrian on a public way, through collision with an automobile operated by the principal defendant. The accident happened on a misty, rainy Sunday evening in March. The plaintiff, who was about sixty-one years old and a little deaf, was walking from her home to church. The evidence was conflicting. If that of the defendant be true, to the effect that the plaintiff stepped from the curb of the sidewalk on his right directly in front of the automobile, which, going at a moderate speed, was brought to a stop within six or eight feet, doubtless the plaintiff was negligent and the defendant was in the exercise of due care. But the plaintiff's version of the incident, although somewhat confused, was that she was walking southerly on the left or east side of the street because the sidewalk was muddy; that she crossed diagonally to the west or right side of the street until within about a foot of the curb, when, perceiving that that sidewalk was muddy, she continued walking southerly in the street five or six steps when she was struck from behind, and that she thought there was an automobile about fifty feet away from her as she neared that curb. There was evidence that on the defendant's automobile were strong headlights, which were lighted and in good condition. The defendant testified that if the plaintiff had crossed the street as she said she did, there was nothing to prevent his seeing her.

The plaintiff had a right to walk in the roadway in preference to the sidewalk under the circumstances here disclosed. While she does not appear to have exercised the highest caution in looking for automobiles, she did observe one, and whether her care in respect of it was that of the ordinarily prudent person was for the

jury. *Murphy v. Armstrong Transfer Co.* 167 Mass. 199. *Donovan v. Bernhard*, 208 Mass. 181. *Leonard v. Stevens*, 213 Mass. 302. *Lynch v. Fisk Rubber Co.* 209 Mass. 16.

Whether the principal defendant was negligent in not sooner seeing the plaintiff and in not so operating his automobile with reference to the concurrent right of the plaintiff and himself to travel upon the public way as to avoid a collision, was for the jury. *Ayers v. Ratshesky*, 213 Mass. 589, 592. *Rasmussen v. Whipple*, 211 Mass. 546. *Gray v. Batchelder*, 208 Mass. 441. *Huggon v. Whipple & Co.* 214 Mass. 64. *Griffin v. Taxi Service Co.* 217 Mass. 293.

*Exceptions sustained.*

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GEORGE A. CRAWFORD & others, trustees, vs. LEOPOLD  
A. NIES & others.

Suffolk. March 23, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Trust, Charitable. Charity. Religious Society. Constitutional Law. Bromfield Street Methodist Episcopal Church in Boston. Cy Pres. Equity Pleading and Practice, Cross bill, Bill of review. Equity Jurisdiction, Administration cy pres, For removal of trustees, For an accounting. Attorney General.*

By a deed delivered and recorded in 1806, certain land was conveyed to trustees "to have and to hold . . . unto them . . . and their successors in office for ever in trust that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time may be agreed upon and adopted by the Ministers and preachers of the said Church at their general conferences in the United States of America and in future trust and confidence that they shall at all times forever hereafter permit such Ministers and preachers belonging to the said Church . . . to preach and expound God's Holy Word therein." *Held*, that a valid charitable trust was created by the deed, whereby the legal title to the land was vested in the trustees for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land.

The above described trust deed also provided that the land was held "in further trust and confidence that as often as any one or more of the Trustees hereinbefore mentioned shall die or cease to be a member or members of said Church

according to the rules and discipline as aforesaid then and in such case it shall be the duty of the stationed Minister or preacher authorized as aforesaid who shall have the pastoral charge of the members of the said church to call a meeting of the remaining trustees as soon as conveniently may be and when so met the said Minister or preacher shall proceed to nominate one or more persons . . . and the said trustees so assembled shall proceed to elect and by a majority of votes shall appoint the person or persons so nominated to fill such vacancy or vacancies." The deed contained no provision that the trustees might incorporate and convey the land to the incorporated body. The trustees incorporated, but made no conveyance as trustees to the corporation. As vacancies occurred among the trustees, no uniform method of filling the vacancies was followed, but it was apparent from the records of the society and various statutes enacted relating to the corporation that the trustees and the governing officials and boards representing the society considered that the trustees were in charge administering the property in accordance with the rules of government of the society. *Held*, that the legal title to the property remained in the trustees appointed by the deed and in their successors chosen in accordance with its provisions, that it was not affected by the statutes relating to the incorporation of the trustees, and that the purposes for which the trust was to be administered were not changed by the conduct of the trustees and the beneficiaries.

By a decree in a suit in equity, in which all parties were represented and which was brought to determine the rights and powers of the trustees under the above described deed, it was ordered that the incorporated trustees should convey the property to certain persons named as trustees in the decree who should hold it subject to the trusts set forth in the original deed, and such conveyance was made. *Held*, that after such decree the trustees named in the decree became the only persons authorized to execute the trust, over which the court as a court of equity had acquired and retained full jurisdiction.

The Legislature has no power to terminate such a trust.

If, under a special statute providing that the trustees appointed by the court as above described might sell the property, and that the net proceeds of sale should "be held and disposed of by said trustees for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may have been or may be agreed upon and adopted at the general conferences of said church in the United States of America, and the final application of said proceeds, in accordance with said rules and discipline, to be a full discharge of the said trustees, the trusts of said deed being thereupon terminated," a sale is made, the trustees thereafter continue to hold the proceeds of the sale subject to the trusts specified in the original deed and do not hold them subject to the trusts described in the statute.

*Whether* a cross bill, filed in a suit in equity after a decision and rescrit of this court determining issues of law raised by the original bill, which sought an adjudication of the rights of the plaintiffs in the cross bill, as four of nine trustees under a deed of land, in the proceeds of a sale of the land made under a decree of court, can be treated as in the nature of a bill of review of the decree of sale, was not determined in this suit, this court holding that, there being no evidence of accident, fraud or mistake affecting the decree and some of such plaintiffs, acting under advice of counsel, having sought the decree, the equities were against the plaintiffs and no reasonable ground for vacation of the decree was shown.

A bill in equity cannot be maintained by the minority of trustees, who under a

trust created by a deed of land hold, for the use and benefit of the members of the Methodist Episcopal Church in the United States of America who had chosen to attend worship in a church formerly upon the land described in the deed, a fund which is the proceeds of a sale of the land, to remove the majority of the board from office because they are unwilling to accede to the views and desires of the plaintiffs and ninety per cent of the members of the society which formerly worshipped in the church.

In 1806 land was conveyed to trustees in trust to erect a church thereon for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and discipline which from time to time might be agreed upon and adopted by the governing bodies of that church. In 1913, owing to changed conditions in the locality where the land and church building were situated, a sale of the property was made under a decree of court having jurisdiction of the parties and the subject matter, which directed that the proceeds of the sale should be held by the same trustees, and this court in a suit in equity to determine the rights of the trustees as to that fund determined that it should be held subject to the same trusts as those described in the original trust deed. Upon a cross bill by a minority of the trustees, it also was *held*, that no occasion was shown for an application of the doctrine of *cy pres*.

In the same case it was *stated* that, if the trustees neglect or refuse to execute the trust or abuse their powers, the Attorney General on his own initiative or at the relation of those who are beneficially interested can petition for their removal and also can have relief in equity for an accounting.

And it also was *stated* that, if the trustees are uncertain as to their powers and duties or are unable to agree among themselves as to them, they can ask for instructions, making the Attorney General a party defendant.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on June 7, 1913, by George A. Crawford, Alexander S. Heath, Ray P. Stewart and Alvah G. Sleeper, four of nine persons appointed in 1913 by the Supreme Judicial Court, in a suit entitled Trustees of the Methodist Religious Society in Boston v. Albert R. Whittier, as successors to the trustees named in a deed, dated March 25, 1806, of William Hall Jackson to Amos Binney and others, as trustees, of property on Bromfield Street in Boston (which is described in the opinion) and to trustees appointed in previous legislative enactments and suits in equity, against the resident pastors of a Methodist Episcopal Church formerly maintained upon the land so conveyed and afterwards maintained in an edifice on Tremont Street in Boston, the district superintendent of the church, the resident bishop, and the other five trustees, Harvey N. Shepard, John L. Bates, James F. Lockwood, William Armstrong and Frank P. Luce, who were appointed at the same time with and in the same manner as were the plaintiffs, and also against four others, William H. H. Bryant, Everett O. Fisk, Charles H. J.

Kimball and A. Howard Powers, who with the other five defendant trustees had been elected trustees to succeed the plaintiffs by the quarterly conference of the religious society and under its rules of government. The bill in substance alleged that such election was of no effect to oust the plaintiffs from their office as trustees, that the defendant board of trustees were holding illegally a fund which represented the proceeds of the sale of the land conveyed by the deed of Jackson to Binney and others, described in the opinion, and sought a determination of what persons as trustees had a right to the possession and control of those funds. Also a

CROSS BILL IN EQUITY, filed on October 14, 1915, by the defendants in the above bill, except William Armstrong, against the plaintiffs and William Armstrong, seeking the relief described in the opinion.

By agreement of all the parties, the Attorney General was joined as a party defendant in both bills and, while the case was pending in this court, filed a waiver of any right to be heard.

The original suit was referred to a master, and, upon a reservation, it was determined by this court in a decision reported in 220 Mass. 61, that the trustees appointed by the decree of 1913, which included the four plaintiffs and the five defendants first named above, were "entitled to the proceeds of the sale of the Bromfield Street real estate and" were "to hold them in accordance with the trusts of the Jackson deed of 1806."

After the decision on the original bill, leave was given for the filing of the cross bill for the purposes described in the opinion. An answer having been filed and issue having been joined, the cross suit was referred to the same master who had heard the original bill. From the report of the master the following facts appeared among others:

During the year 1912 there were differences of opinion among the trustees as to the application of any part of the income from the money or property received as the proceeds of the sale of the church property. Some of the trustees expressed their desire to provide another place of worship for the society and attempted to do so, while the other trustees were in favor of having worship conducted in the church building on Tremont Street. During that year certain sums of money were voted by the trustees for the use of the society in carrying on its work in the Tremont Street



church, and at the election of trustees by the quarterly conference in 1913 the defendants in the cross bill, Crawford, Heath, Stewart, and Sleeper, were not re-elected as trustees and the plaintiffs Bryant, Powers, Fisk, and Kimball were elected in their places. In the year 1914 the same trustees were elected as in 1913, but in 1915 Armstrong was not re-elected and C. O. Kepler was elected in his place.

During the years 1913 and 1914 the trustees elected under the Discipline [the book containing the rules of government of the Methodist Episcopal Church] administered the fund received from the sale of the church property, and the proceeds of the sale were continued in the custody of Shepard, Lockwood and Luce, who continued in their possession to the time of the hearings upon the cross bill. No question was made that the funds had not been properly invested and cared for, and it was agreed that the fund remained intact except for such sums as from time to time had been paid from the income in accordance with the direction of the quarterly conferences and the votes of the trustees and under an interlocutory decree entered in this case.

After receipt of the rescript from this court on the original bill, the trustees appointed by the court met and voted to appoint a committee to determine by-laws for their government. Subsequently eight meetings of this board were held, at which various matters had been acted upon. The five persons named as defendants in the cross bill made a majority of the nine persons appointed by the court, and in all matters of importance at the meetings they voted against the other members. The quarterly conferences from time to time had directed them to provide money for assistance in support of worship at the Tremont Street church and in payment of the salary of the minister, but on each of these requests the five members who are defendants in the cross bill voted not to comply with such directions, while the other four trustees voted in favor of complying with the directions.

At the quarterly conference held on April 4, 1915, it was voted to request the bishop to inform the society what were the rights of the quarterly conference in reference to the trustees who held the proceeds of the sale of the property, and whether the board of trustees was not amenable to the quarterly conference as a board of trustees of the Methodist Episcopal Church, and what proce-

sure the society should undertake in order that the trust in the original deed be carried out.

In response to this request the bishop rendered an opinion upholding the quarterly conference.

At a meeting of the trustees held on April 12, 1915, communications from the quarterly conference containing the opinion of the bishop were read, and thereupon it was voted: "That this board denies the right of any bishop, or any quarterly conference to control the actions of this body." On this vote the five trustees who are defendants in the cross bill voted in favor of and the other four trustees voted against its adoption. Since that meeting there have been other meetings of the trustees, at which Crawford has been elected president of the board and Sleeper has been elected treasurer and a committee consisting of the president, treasurer, secretary and two other members has appointed to have the custody of the trust fund, and demand has been made that the former committee turn the fund over to them. This the former committee have refused to do until directed to do so by decree of court. In all of these matters the votes were, the five persons who are defendants in the cross bill against the four others, and the five persons stated that they did not consider that as trustees they were accountable to any authority other than this court, and refused to join in a petition to the court for instructions.

There was a committee appointed by the president of the board to investigate and make report as to what use should be made of the trust fund, and Crawford as chairman of that committee reported that the committee was of opinion that no part of the fund should be used upon the church property on Tremont Street, and that "in looking for a place where a new plant would be productive, with the prospect of ever increasing opportunities for usefulness and the certainty of results justifying the expenditure of whatever sums might be necessary for the full equipment of the work and the application of the greatest efforts within our control, we are attracted and impressed by the proposition to build a church to be known as 'The Church of All Nations.' This church would be associated with but not under the control of the Morgan Memorial work. The building and the work would be ours but would command the sympathy and support of many philanthropic people who are not Methodists and who could not be induced to

give either sympathy or support to the ordinary forms of activity of any Methodist Church. We recommend that the committee be continued under instruction to secure and report the fullest details as to the location, cost of land, building and equipment for such a work."

The master further found: "The Bromfield Street society has been joined with the Tremont Street society, and the combined societies are recognized by the Annual Conference as the Methodist Religious Society in Boston commonly known as the Bromfield Street society. The society is possessed of the church property on Tremont Street, and religious services are being regularly conducted in that building, which I find to be a sufficient building for all of the purposes of the society at the present time. The members of the society as at present constituted, with the exception of not more than one tenth thereof, are satisfied to continue worship in the present building, and have no desire for the erection of a new building. The society is at present in satisfactory condition; the attendance at services is large, and in the various branches of the work in connection with the church work there is an active interest manifested. The society is, however, in need of financial assistance in carrying on its work, and the cutting off of the assistance it has been receiving from the income from the fund in the hands of the trustees has impaired the work which was being done. With the exception of the members in the proportion above stated, all of the members of the society approve of the filing of the cross bill in this case, seeking a determination of the rights of the trustees and of the society in and to the trust fund.

"The title to the church property on Tremont Street has never been in the board of trustees appointed by the court, but has been in the trustees elected under the Discipline."

Other material facts found by the master are stated in the opinion.

The only exceptions to the report of the master were by the defendants in the cross bill and were described by the master, as follows:

"The evidence offered in support of the allegations in the cross bill was largely documentary, consisting of the early records of the church society, records of the quarterly conferences, copies

of deeds, and early editions of the Discipline of the church as it had from time to time been amended or changed.

"The plaintiffs [defendants in the cross bill] objected to the introduction of the records of the society and of the quarterly conferences, and stated as their objections, first, that the records were not properly identified; secondly, that they were offered for the purpose of varying the terms of a written instrument; and thirdly, because they have no bearing upon the matters in issue.

"It was agreed that at the time when the church property was sold, and it became necessary to remove all of the personal property of the society therefrom, a large amount of the personal property was removed to a storage warehouse in Boston, including a safe which had been used by the officers of the society, and that during the progress of the hearings upon the original bill of complaint, and at some subsequent time, counsel for the petitioners and counsel for the respondents (each of counsel being members of trustees appointed by the court) went to the storage warehouse and took from the safe the books which were offered in evidence. Many of the books contained records under dates so many years ago that it was apparent that it was impossible to produce the person who had made the entries, and in view of the place and manner in which the possession of the books had been kept I ruled that they had been sufficiently identified to be offered and received in evidence. So far as the objections related to the second and third objections I ruled that the records be admitted; to all of which rulings the plaintiffs requested that their objections be noted."

In their brief before this court the defendants in the cross bill stated: "The first objection as to the proper identity of the records is hereby waived, but we urge that the records offered as evidence are improperly admitted for the purpose of varying the terms of a written instrument."

The case was reserved by *Pierce, J.*, for determination by this court "upon the master's report under cross bill and the exceptions thereto of the defendants in the cross bill, and for final decree. . . . Reference may be had to the printed record in the original case, such final decree or decrees to be ordered on the entire case as to justice and equity shall appertain."

*A. G. Sleeper*, for the plaintiffs.

*H. N. Shepard & J. L. Bates*, (*J. E. Macy* with them,) for the defendants.

BRALEY, J. The defendants after the decision and order for a final decree in *Crawford v. Nies*, 220 Mass. 61, were permitted to file a cross bill. The original plaintiffs having answered and issue having been joined the case was recommitted to the master, and under the reservation of the single justice is before us upon the pleadings, the master's report and the exceptions thereto, with leave to refer "to the printed record in the original case, such final decree or decrees to be ordered on the entire case as to justice and equity shall appertain." We shall for convenience in designation refer to the plaintiffs in the cross bill as the plaintiffs, and to the defendants therein, who alone excepted, as the defendants. But their first exception having been waived, and the remaining exceptions, that the records of the society admitted in evidence were offered for the purpose of varying the terms of a written instrument, and that the records "have no bearing upon the matters in issue," being without merit or immaterial, the question for decision is, whether upon the record now presented the order for the decree, "that the trustees appointed by the court decree of 1913 are entitled to the proceeds of the sale of the Bromfield Street real estate and are to hold them in accordance with the trusts of the Jackson deed of 1806," should be reversed or modified. *McKarren v. Boston & Northern Street Railway*, 194 Mass. 179. *First Baptist Church of Sharon v. Harper*, 191 Mass. 196. *Crawford v. Nies*, 220 Mass. 61, 67. The specific prayers in substance ask, that the proceeds of the sale of the trust property shall be held by the plaintiffs and their successors for the support of a church building or place of worship for the use of the members of the "Methodist Religious Society in Boston," subject to the rules and Discipline of the Methodist Episcopal Church of the United States, the trustees forever to permit such ministers and preachers as may be duly authorized by the authorities of said church to preach therein, and for the general uses and purposes of the society under and in accordance with the Discipline; that the trustees heretofore appointed by decree of this court be discharged, and that the plaintiffs and their successors elected according to the Discipline of the said church for the said

religious society, as the Discipline may from time to time provide should be the trustees who at all times are to be subject to the control of and accountable only to the church authorities, with a general prayer for such other and further relief as the court deems appropriate.

While the master states that there was no evidence that any society was ever known as the "Methodist Religious Society," except as such inference might be drawn from the fact that when the trustees were incorporated by the St. of 1808, c. 70, they were designated under the name of "Trustees of the Methodist Religious Society in Boston," the second as well as the first report leaves no doubt that the local body of worshippers from the beginning were in affiliation with the general organization known as the Methodist Episcopal Church and intended to conform to its discipline. It having become expedient to provide a house of worship, land was purchased and a church building erected partially paid for by moneys raised by donations. The title was held by nine trustees named in the indenture between William Hall Jackson and Amos Binney and others, among whom were Binney and himself, dated March 24, 1806, and duly recorded. By the terms of the instrument the trustees and their successors in office held the property "for ever in trust that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America according to the rules and Discipline which from time to time may be agreed upon and adopted by the Ministers and Preachers of the said Church at their general conferences in the United States of America and in further trust and confidence that they shall at all times forever hereafter permit such Ministers and Preachers belonging to the said Church as shall from time to time be duly authorized by the general conferences of the Ministers and Preachers of the said Methodist Episcopal Church, or by the yearly conferences authorized by the said general conferences and none others to preach and expound Gods Holy Word therein and in further trust and confidence that as often as any one or more of the Trustees hereinbefore mentioned shall die or cease to be a member or members of said Church according to the rules and Discipline as aforesaid then and in such case it shall be the duty of the stationed Minister or Preacher authorized as aforesaid who shall have

the pastoral charge of the members of the said church to call a meeting of the remaining Trustees as soon as conveniently may be and when so met the said Minister or preacher shall proceed to nominate one or more persons to fill the place or places of him or them whose office have been vacated as aforesaid provided the person or persons so nominated shall have been one year a member or members of the said Church immediately preceding such nomination and of at least twenty-one years of age and the said Trustees so assembled shall proceed to elect and by a majority of votes shall appoint the person or persons so nominated to fill such vacancy or vacancies in order to keep up the number of nine Trustees for ever and in case of an equal number of votes for and against the said nomination the stationed Minister or Preacher shall have the casting vote. Provided Nevertheless That if the said Trustees or any of them or their successors have advanced or shall advance any sum or sums of money or are or shall be responsible for any sum or sums of money on account of the said premises and they the said Trustees or their successors be obliged to pay the said sum or sums of money, they or a majority of them shall be authorized to raise the said sum or sums of money by selling the pews in the said house when completed for that purpose subjecting the purchasers, however to the rules and Discipline of the said Methodist Episcopal Church as aforesaid forever or by a mortgage on the said premises or by selling the said premises after notice given to the Pastor or Preacher who has the oversight or charge of the Congregation attending divine services on the said premises if the money due be not paid to the said Trustees or their successors within one year after such notice given and if such sale take place the said Trustees or their successors after paying the debt and all other expenses which may be due from the money arising from such sale, shall deposit the remainder of the money arising from such sale in the hands of the Stewards belonging to or attending Divine Service on the said premises which surplus of the produce of such sale so deposited in the hands of the said stewards shall be at the disposal of the next yearly conference authorized as *as* aforesaid which said yearly conference shall dispose of the said surplus money according to the best of their Judgment for the use of the said Society."

The instrument being free from ambiguity, it cannot be varied

or controlled by extrinsic evidence. A valid charitable trust was created, under which the legal title vested in the trustees for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America," who might choose to attend worship in the church erected and maintained on the land. *Austin v. Shaw*, 10 Allen, 552. *Chase v. Dickey*, 212 Mass. 555. *Ripley v. Brown*, 218 Mass. 33. *Crawford v. Nies*, 220 Mass. 61, 64.

The mode of filling vacancies as they occurred after the trustees by vote had increased their number to fifteen, which included seven of the original trustees, and their incorporation by St. of 1808, c. 70, as well as under the amendatory act of 1828, c. 144, reducing their number to nine and providing that the pewholders should nominate suitable persons, being "members of the said Society and inhabitants of said Boston" to fill vacancies, "and from such nominations the remaining trustees shall proceed to elect by a majority of votes a person to supply such vacancy," was not uniform. The master finds that sometimes the St. of 1808, c. 70, was complied with while at other times the trustees were nominated by the pewholders until the St. of 1828, c. 144, after which nominations were made only by the pewholders, although upon appointment they performed all the duties appertaining to their office as required by the Discipline. He also found that in the sale and conveyance of portions of the property they acted as if they were not an incorporated board, but had been chosen in the matter prescribed by the Discipline, "and it is apparent from the records of the trustees and of the quarterly conferences that the trustees and the governing officials and boards representing the society considered that the trustees were properly in charge of the church property and conducting its management in accordance with the Discipline as from time to time in force until the year 1891." But the society itself as a voluntary religious association, whatever its name, never had title to the property of the trust which the trustees could convey under either the St. of 1808, c. 70, or St. 1847, c. 280, §§ 1, 2, Gen. Sts. c. 30, §§ 43-45, St. 1874, c. 177, Pub. Sts. c. 39, §§ 1, 4, St. 1884, c. 78, relating to the powers of trustees of any society of the Methodist Episcopal Church to transfer parochial property. *Sohier v. St. Paul's Church*, 12 Met. 250. *Currier v. Trinity Society*, 109 Mass. 165. *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 206, 207. See R. L. c. 37, §§ 1-4, 6. The



act of incorporation did not change the trust, which remained the same as if the statute had not been passed. *Hadley v. Hopkins Academy*, 14 Pick. 240, 254, 255.

It is also plain that before the enactment of St. 1878, c. 254, § 1, if vacancies occurred the new trustee or trustees would not acquire title unless by conveyance from the surviving members of the original board, or their successors to whom title had been lawfully transmitted. *Peabody v. Eastern Methodist Society in Lynn*, 5 Allen, 540. *Glazier v. Everett*, ante, 184, and cases cited.

A brief reference to the title after the trustees voted to mortgage the property to provide funds for the payments maturing on the purchase price of the land, and on the contract entered into by them for the erection of the church building, will be sufficient. The various transfers are enumerated and fully described in the master's elaborate report. If the method chosen was not technically adapted for the purpose, and on their face the conveyances are absolute in form, yet all parties understood that the transaction was intended as a mortgage and as security for the reimbursement of whomsoever might lend or advance the required amount. *Campbell v. Dearborn*, 109 Mass. 130. The local society thereafter and until the sale under the decree of this court hereinafter referred to continued to use the premises for religious worship, and the master reports that the property remained in the unquestioned control and management of the original trustees or of their successors after as well as before incorporation, until the transfer to the board of trustees appointed by the court, a period substantially of eighty-two years.

The charity however was not thereby extinguished. It could not be remoulded or changed to a trust to be treated and administered exclusively for the maintenance and benefit of the society. No provisions are found in the deed authorizing a resettlement or devolution of the property in the discretion of the trustees, or releasing the property from the charitable purpose to which it had been devoted and dedicated. *Perry on Trusts*, §§ 346, 347. *Bartlett v. Nye*, 4 Met. 378, 380. *Boxford Religious Society v. Harriman*, 125 Mass. 321, 328. *Winthrop v. Attorney General*, 128 Mass. 258. *Missionary Society v. Chapman*, 128 Mass. 265, 268. St. 1808, c. 70. St. 1828, c. 144.

By the decree of October 8, 1891, in a suit brought in this court

to determine their rights and powers,\* the incorporated trustees were ordered to convey by a sufficient deed to the trustees appointed and named in the decree, all the real estate "as had not been conveyed to other parties" described in the "deed from William Hall Jackson to Amos Binney and others being the real estate generally known as the 'Bromfield Street Church Estate' . . . to hold, manage, or convey said estate upon the trusts and for the purposes as set forth in said deed from William Hall Jackson to Amos Binney and others."

Whichever way is taken the result is the same. If the trustees appointed under the Discipline had no title, the trust had not perished. *Bartlett v. Nye*, 4 Met. 378, 380. *Sells v. Delgado*, 186 Mass. 25, 28. And the trustees appointed by the court were seised of the legal estate. *Hadley v. Hopkins Academy*, 14 Pick. 240, 253. Pub. Sts. c. 141, §§ 5, 6. If they had title under the St. of 1808, c. 70, § 4, or by succession under the indenture, that title passed by their conveyance under the order of the court to the trustees named in the decree. This decree not having been vacated, and the conveyance having been made, the trustees thus appointed were the only persons authorized to execute the trust

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\* This suit is described by the master as follows: "In the year 1889 the plaintiff Crawford was assigned by the bishop at the Annual Conference to be the minister at the Bromfield Street church. Because of differences of opinion between the trustees and him as to the rights and powers of the trustees over the church property, he made contention that the trustees did not properly hold title to the property. The matter was discussed at the quarterly conferences, and at the quarterly conference held on November 4, 1889, Doctor Crawford and Silas Pierce were authorized to institute proceedings in this court for the appointment of trustees to hold title to the property under the original deed; and subsequently such a petition was filed in this court, which with the proceedings thereunder appears in the case of George A. Crawford et al., petitioners, numbered 3007 on the equity docket. The case was referred to a master, but no hearings were had, and after the matter had been discussed at great length among the parties interested, a decree was entered by and with the consent of all parties on October 8, 1891, in which nine persons were named as trustees, and it was ordered that the incorporated trustees convey by proper deeds, to the trustees therein named and appointed, the land (or so much thereof as had not been conveyed to other parties) described in the deed of Jackson to Binney et als., to hold, manage, or convey the same upon the trusts and for the purposes set forth in the original deed."

over the administration of which the court as a court of equity had and retained full jurisdiction. *Bowditch v. Banuelos*, 1 Gray, 220. *Attorney General v. Barbour*, 121 Mass. 568, 573. *White v. Gove*, 183 Mass. 333. *Jackson v. Phillips*, 14 Allen, 539, 567, 577. *Sohier v. Trinity Church*, 109 Mass. 1, 17. *Chase v. Dickey*, 212 Mass. 555. *Perry on Trusts*, (6th ed.) § 282. Pub. Sts. c. 141, §§ 5, 20, now R. L. c. 147, §§ 5, 15.

The decree and vesting of the title do not appear to have settled the controversy, and the master states that while at first the trustees appointed by the court were also appointed in accordance with the Discipline, yet when vacancies occurred they were not filled as required by the terms of the deed, but as prescribed by the Discipline "as it existed at the respective times."

The trustees, however, appointed under the Discipline subsequent to the decree do not appear to have acquired any title to the fee, and, it having been decided to sell the property which had very greatly appreciated in value and become undesirable as a place for religious worship, they petitioned the Legislature, and the St. of 1892, c. 103, was passed. By this statute the trustees appointed by the court were authorized to sell at public or private sale, "Such sale and conveyance to be made with the consent of the persons or bodies whose consent to sales of real estate is required by the Discipline and usages for the time being of the Methodist Episcopal Church in the United States of America; — the net proceeds of sale to be held and disposed of by said trustees for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and Discipline which from time to time may have been or may be agreed upon and adopted at the general conferences of said church in the United States of America, and the final application of said proceeds, in accordance with said rules and Discipline, to be a full discharge of the said trustees, the trusts of said deed being thereupon terminated."

The Legislature had no power to terminate the trust, and if a sale were effected the proceeds would go to the trustees and their successors appointed by the court in accordance with Pub. Sts. c. 141, §§ 5, 6, (now R. L. c. 147, §§ 5, 6,) to be held in place of the land. *Cary Library v. Bliss*, 151 Mass. 364. *Codman v. Crocker*, 203 Mass. 146, 150, and cases cited. *Sohier v. Massachusetts*

*General Hospital*, 3 Cush. 483, 496. *Clarke v. Hayes*, 9 Gray, 426. *Denny v. Mattoon*, 2 Allen, 361, 377, 378. *Bozford Religious Society v. Harriman*, 125 Mass. 321, 328. *Thissell v. Schillinger*, 186 Mass. 180. 6 Cyc. 967, 971. See Pub. Sts. c. 141, § 20; R. L. c. 147, § 15.

A period of ten years having elapsed negotiations took place which resulted in a sale, and although the provisions of the church discipline for the selection of trustees and sale of the property apparently had been complied with, the purchaser was not satisfied, and at the request of his conveyancer the trustees again sought the aid of the court. The record shows that Albert R. Whittier, the defendant in the suit then brought, was the only surviving trustee of those named in the first decree, or in the St. of 1892, c. 103. The present plaintiffs in the cross bill, Nies and Leonard, "being the stationed preachers now in charge of the Methodist Religious Society in Boston sometimes known as the Bromfield Street Methodist Episcopal Church," assented to the petition, and requested that the prayer for the appointment of the nine persons named as trustees under the deed made by William Hall Jackson be granted. By the decree entered January 17, 1913, with the consent of all parties in interest, the resignation of Whittier was accepted, and the new trustees were appointed "under the deed from William Hall Jackson to Amos Binney and others, . . . and as authorized in chapter 103 of the Acts of the year 1892."

The trustees so appointed were officers of the court, subject to its supervision and control, and being seised of the legal title under R. L. c. 147, §§ 5, 6, and having been empowered to sell, they could make, execute and deliver a valid conveyance of the property which the purchaser would hold discharged from the trust. A sale having been made, the trustees thereafter held the proceeds under the terms of the Jackson trust. *Bradstreet v. Butterfield*, 129 Mass. 339. *Sohier v. Massachusetts General Hospital*, 3 Cush. 483. *Chapin v. First Universalist Society in Chicopee*, 8 Gray, 580. *Hadley v. Hopkins Academy*, 14 Pick. 240.

We have reviewed the history of this trust at much greater length than would have been desirable if the plaintiffs, who do not question the validity of the purchaser's title, had not urgently contended that the trustees under the decree should be discharged and that the alleged trustees and their successors appointed solely

under ecclesiastical authority should be declared the trustees to administer the trust subject only to the rules and Discipline "of the Methodist Episcopal Church in the United States of America."

But even if the cross bill could be treated as in the nature of a bill of review, the decree of sale when read shows no error of law, and if the discretionary power of the court to vacate is invoked, the plaintiffs have failed to show any reasonable ground for such action. The equities are all against them, for the record is bare of any suggestion of accident, fraud or mistake, and some of them, as we have said, acting presumably under the advice of counsel, not only consented to, but asked for the relief granted. *Coghlan v. Dana*, 173 Mass. 421. *Gray v. Chase*, 184 Mass. 444. *Lakin v. Lawrence*, 195 Mass. 27. *Mulrey v. Carberry*, 204 Mass. 378; *S. C.* 207 Mass. 390. *Kapiolani v. Atcherley*, 238 U. S. 119.

While a majority of the present board are unwilling in the administration of the trust to accede to the views and desires of the plaintiffs and the minority agreeing with them, the cross bill under the prayer for general relief cannot be maintained for their removal. *Fordyce v. Dillaway*, 212 Mass. 404, 411. *Tempest v. Lord Camoys*, 21 Ch. D. 571.

Nor on the record has the doctrine of *cy pres* on which the plaintiffs further rely any application; "for that is to be applied in giving a new direction to a charity, only when it becomes necessary to do so to prevent the charity failing, because it cannot be applied agreeably to the literal intention of the donor." *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280, 301. And whenever a charitable trust can be administered in accordance with the directions of the donor or founder, this court "is not at liberty to modify it upon considerations of policy or convenience." *Jackson v. Phillips*, 14 Allen, 539, 591, 592. It is unnecessary to consider the question whether a case can be stated under which the doctrine will become applicable in the administration of the trust.

If the trustees appointed under the decree neglect or refuse to execute the trust, or abuse their powers, the Attorney General on his own initiative or at the relation of those who are beneficially interested can petition for their removal, and also can have relief in equity for an accounting, or, if the trustees are uncertain or are unable to agree among themselves as to their powers and duties,

they can ask for instructions making him a party defendant. R. L. c. 147, § 11; c. 159, § 1. *Odell v. Odell*, 10 Allen, 1, 15. *Drury v. Natick*, 10 Allen, 169. *Jackson v. Phillips*, 14 Allen, 539. *Attorney General v. Garrison*, 101 Mass. 223. *Ripley v. Brown*, 218 Mass. 33. *Attorney General v. Bedard*, 218 Mass. 378.

We are of opinion for the reasons stated that the cross bill should be dismissed.

*Decree accordingly.*

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GEORGE L. YOUNG vs. ALEXANDER T. WALKER & another.

Suffolk. March 28, 29, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Limitations, Statute of. Trust. Equity Jurisdiction.*

A suit in equity by one, who, under an agreement in writing with the owner of certain land providing for its purchase and for payment therefor in instalments, had entered upon the land and had made extensive improvements, against the owner and one who, with full knowledge of the agreement and of expenditures made by the plaintiff toward the purchase price and for improvements, had purchased the land from the owner and had dispossessed the plaintiff, is barred by the statute of limitations if it is not brought until more than six years have passed from the date when the plaintiff received a notice in writing of the sale by the owner in repudiation of his agreement.

In the same suit it appeared that the suit was not brought until six years had passed from the time when the plaintiff was dispossessed and also from the date when a modification of the contract between the plaintiff and the owner of the land provided that the purchase by the plaintiff should be completed and the land conveyed to him, and it was held, that the statute of limitations had run, whichever date was considered in computation.

BILL IN EQUITY, filed in the Superior Court on December 2, 1914, and afterwards amended, against Alexander T. Walker and Marcia G. Greenough, alleging in substance that on September 1, 1902, the plaintiff and the defendant Greenough made a contract, a memorandum of which stated that she did "sell to" the plaintiff the real estate known as "Ashley Hall" or the "Whittemore Property" and certain personal property therein, the plaintiff to pay to her \$450 monthly and \$6,500 in cash at the expiration of three years and to have a clear title, the plaintiff agreeing that, in case he failed to pay the \$6,500, he would turn over to her the estate

with all improvements he had made thereon; that he entered into possession of the property and with the knowledge of the defendant Greenough expended at least \$5,000 in permanent improvements; that he made all the monthly payments required by the contract, amounting to \$1,350; that, owing to an outstanding mortgage upon the premises, the time for the final payment of \$6,500 was extended to April, 1908; that, with knowledge of the agreement and of the expenditure by the plaintiff in improvements upon the estate, the defendant Walker induced the defendant Greenough to convey the property to him in fraud of the plaintiff; that on May 7, 1907, the plaintiff was notified in writing by real estate brokers acting for the defendant Walker that the sale and conveyance had been made to the defendant Walker and was directed to quit the premises, and that shortly thereafter the defendant Walker dispossessed the plaintiff and took possession of the premises.

Both defendants demurred to the bill on the ground that the plaintiff was barred from relief by the statute of limitations and by laches.

The demurrer was sustained by *McLaughlin, J.*, and a final decree was entered dismissing the bill. The plaintiff appealed.

*E. I. Smith*, for the plaintiff.

*W. D. Gray*, for the defendant Greenough.

*H. M. Hutchings*, for the defendant Walker, submitted a brief.

PIERCE, J. Upon the allegations in the bill, admitted to be true by the demurrer, the defendant Walker had full knowledge of the terms of the agreement dated September 1, 1902, at the time he took title to the premises and dispossessed the plaintiff. He then knew that the plaintiff had paid \$1,350 in partial performance of the terms of the agreement; that the plaintiff had expended not less than \$5,000 in the improvement and preservation of the property, and that the time for the payment of the balance of the price to be paid and for the delivery of the deed had been extended by agreement for one year following April, 1907.

These facts and other facts set out in the bill establish that Walker took title to the land with knowledge of the plaintiff's equitable interest therein. It follows, that the plaintiff's right to relief in equity is the same against Walker as it would be from his grantor if the conveyance had not been made. *Clark v. Flint*, 22 Pick.

231, 239. *Murphy v. Marland*, 8 Cush. 575, 579. *Connihan v. Thompson*, 111 Mass. 270.

There was an implied trust created in favor of the plaintiff when he was allowed to enter upon the land and to make improvements thereon, to the extent, at least, that the price had been paid or tendered. *Felch v. Hooper*, 119 Mass. 52. *Merrill v. Beckwith*, 163 Mass. 503. See *Rayner v. Preston*, 18 Ch. D. 1; *Rose v. Watson*, 10 H. L. Cas. 672; *In re Stucley*, [1906] 1 Ch. 67.

On May 7, 1907, before Walker took possession of the property, the defendant Greenough notified the plaintiff that she had sold the premises to Walker and that Walker would take possession at once. This act was a distinct repudiation of her agreement, and there is nothing to indicate that thereafter she changed her position or that she was able to convey the property on the day to which, by the oral agreement, the time for the passing of title had been extended.

It is admitted by the plaintiff, that all rights at law or in equity arising from the breach of contract to convey or from the conversion of the personal property, are barred by the statute of limitations. *Farnam v. Brooks*, 9 Pick. 212. *Wells v. Child*, 12 Allen, 333. *Bremer v. Williams*, 210 Mass. 256. The plaintiff, however, contends that the suit is not founded upon right arising out of a breach of contract, but upon his equitable right to a performance of the contract. He asserts that his equitable interest is in equity analogous to the title of a legal mortgagor, and that his rights as such can be barred only by adverse possession of twenty years. This is in effect a claim to a vendee's lien, which is not recognized in this Commonwealth. *Ahrend v. Odiorne*, 118 Mass. 261.

It is no longer doubted that an open disavowal and express repudiation of an express or implied trust calls the *cestui que trust* to defend his equitable right if he would not have it barred by the statute of limitations. *Currier v. Studley*, 159 Mass. 17, 20. *Ryder v. Loomis*, 161 Mass. 161. *Lufkin v. Jakeman*, 188 Mass. 528. *Thompson v. Thompson*, 1 Jones Eq. 430. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 633. *Edwards v. University*, 1 Dev. & Bat. Eq. 325.

In the case at bar the statute of limitations had run whether counted from the day of the letter of repudiation, from the entry of Walker, or from April, 1908.

*Decree affirmed.*



## GEORGE M. ROSEN &amp; others vs. LOUIS B. MAYER &amp; another.

Suffolk. March 29, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; PIERCE, JJ.

*Equity Jurisdiction*, Retention of suit for damages only. *Damages*, In equity.

A bill in equity by the purchaser of all of the shares of the capital stock of a corporation operating a theatre alleged that the sale was induced by fraud of the seller in various respects and sought a rescission of the sale, repayment of the purchase price, an injunction restraining negotiation of notes given for part of the price and their cancellation, and the assessment of damages. The defendant opposed rescission when the suit was brought. During ten months while the suit was pending, the plaintiff carried on the business of the corporation and made the enterprise successful. The judge who heard the suit found that the sale was induced by fraud of the defendant in a certain particular, and, at the request of the plaintiff, who elected to waive the prayers of the bill relating to rescission, retained the suit for the awarding of damages only and found for the plaintiff in the sum of \$1,000. *Held*, that, the court having had jurisdiction in equity when the suit was brought, the judge in a proper exercise of his discretion might retain it solely for the assessment of damages, and that his discretion was not exercised improperly.

DE COURCY, J. The plaintiffs, on April 4, 1914, purchased from the defendant, Louis B. Mayer (herein called the defendant), all the shares of capital stock in the Orpheum Theatre Company, and paid therefor \$2,750 in cash and \$4,000 in promissory notes secured by the stock as collateral and maturing apparently on November 5, 1914, January 5, 1915, and April 5, 1915. The bill of complaint was filed on July 1, 1914. It alleged that the plaintiffs had been induced to purchase the shares by means of certain false and fraudulent representations of the defendant; and prayed, among other things, for a rescission of the sale, repayment of the purchase price, cancellation of the notes, assessment of damages, and a temporary injunction to restrain the negotiation of the promissory notes and stock certificates. The trial judge \* on April 28, 1915, found that the defendant did fraudulently misrepresent what the income of the business was during some months before the sale, and that this constituted an inducement to the plaintiffs to purchase. As they had carried on the business pending the

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\* McLaughlin, J.

litigation, and had made the enterprise a successful one, the plaintiffs, at the hearing, disclaimed a desire to have the transaction rescinded; and the judge found for them in damages.\*

The defendant has waived his right to have a report of the evidence made part of the record, and the only question raised by his appeal is whether the final decree is warranted by the pleadings and the facts found by the trial judge. *Huntress v. Allen*, 195 Mass. 226, 233. *E. W. Burt & Co. Inc. v. Coes & Young Co.* 212 Mass. 134. His sole contention before us is that the court did not have power to retain the bill merely for the assessment of damages, after the plaintiffs had abandoned their claim for relief by way of rescission.

The bill, as originally filed, admittedly presented a proper claim for equitable relief; and upon the court's findings of fact a rescission properly could have been granted. The plaintiffs had a right to relief in equity if only to prevent the negotiation of the notes to a *bona fide* holder. *Brown v. Statter*, 206 Mass. 119. Jurisdiction in equity was fixed when they brought their bill in good faith seeking the equitable relief to which they were entitled. *Lexington Print Works v. Canton*, 171 Mass. 414. That jurisdiction was not lost when the court proceeded to award damages as the remedy adapted to the case under the circumstances then existing. It is the general practice of our courts, where a plaintiff without fault on his own part, fails of specific equitable relief to which originally he was entitled, to retain jurisdiction of the cause in equity for the purpose of assessing damages. *Milkman v. Ordway*, 106 Mass. 232. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 47, and cases cited. This practice is not confined to cases where the relief sought is prevented by act of the defendant, as in *Stewart v. Joyce*, 201 Mass. 301. In many instances the change of circumstances arising from the lapse of time, renders the specific relief unsuitable or inequitable. *Brande v. Grace*, 154 Mass. 210. *Case v. Minot*, 158 Mass. 577. *Lexington Print Works v. Canton*, *ubi supra*. *DeMinico v. Craig*, 207 Mass. 593. *Wentworth v. Manhattan Market Co.* 216 Mass. 374.

The fact that the plaintiffs waived their prayer for rescission did not prevent the court from awarding damages in the exercise of a sound discretion. See *Hanson v. Innis*, 211 Mass. 301;

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\* In the sum of \$1,000.

*Nickerson v. Bridges*, 216 Mass. 416, 421. Plainly there was no abuse of discretion on the part of the judge in retaining the bill for that purpose. The last note admittedly was not paid until after the hearing on the merits. The defendant had opposed rescission when the bill was brought, and when that remedy presumably would have been adequate. Months later, when the efforts of the plaintiffs had resulted in increasing the value of the stock, the judge well might believe that in the interest of justice they and not the defendant should reap the profit of their enterprise, and that they should recover the damages resulting from the defendant's fraudulent misrepresentation without the delay and expense of another action.

*Decree affirmed with costs.*

*A. Berenson*, for the defendant Mayer.

*Lee M. Friedman, M. M. Horblit & J. Wasserman*, for the plaintiffs, were not called upon.

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### MICHAEL JOYCE vs. POWER CONSTRUCTION COMPANY.

Suffolk. March 29, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Negligence, Employer's liability. Practice, Civil, Exceptions.*

Where a corporation which is constructing a dam uses during a period of at least four months for the purpose of conducting steam to steam drills several stationary steam boilers set up in shacks and a system of steam pipes running from them to the drills, and it does not appear that any change in the location of a boiler and shack, once placed in position, was contemplated during the progress of the work, or that a change in the use, length or direction of a pipe line necessitated or permitted an interference with the arrangement of the pipes connected with the boiler within the shack, the boilers and the pipes connected with them are permanent appliances and the corporation owes to its employees the common law duty of maintaining such appliances in a reasonably safe condition and of warning those using them of perils attending their use.

If, at the trial of an action against the corporation by an employee who was in charge of one of such boilers for personal injuries caused by the breaking or bursting inside the shack of a three inch steam pipe running from it at a point where, by reducing bushings, it was joined to a two inch pipe, also connected with the boiler, there is evidence tending to show that the break was caused either by the sagging of the two inch pipe due to its being supported at a point

outside the shack on a stone which rested on ice which had melted, or by the chemical action upon the connecting threads at the joint of the two pipes of ashes in which the pipes were buried, or to both causes acting concurrently, it cannot be ruled as a matter of law that the plaintiff, who is not shown to have known of the connection of the pipes beneath the ashes, is precluded from recovery by reason of the fact that the pipes running to the drills were cut, joined and laid by his fellow employees as need occurred, because it cannot be ruled as a matter of law that the plaintiff's injuries were caused solely by the negligence of his fellow employees in not properly supporting the pipe at a point outside of the shack and they might have been found to have been caused in part by a neglect of duty on the part of the defendant in failing properly to protect the pipe under the shack from the chemical action of the ashes.

The record in the above action stated that, at the trial, subject to an exception by the defendant, the judge in his charge stated: "I draw a distinction between this kind of work, that is, a construction of this character and a temporary staging put about a building, however I may be wrong in relation to that." Before this court the defendant presented no argument intended to show that it was harmed by such portion of the charge, and it was assumed that the exception was waived.

TORT for personal injuries, received by the plaintiff on May 24, 1912, while in the employ of the defendant in the construction of a dam which the defendant was building at Mountain Mills, Vermont, during 1911 and 1912, and caused under the circumstances described in the opinion by the breaking or bursting of a pipe used to conduct steam to steam drills used in excavation work. Writ dated July 19, 1912.

In the Superior Court the case was tried before *Stevens, J.* The material evidence and certain rulings requested by the defendant and refused by the judge subject to exceptions by the defendant are described in the opinion. There was a verdict for the plaintiff in the sum of \$4,000. The defendant alleged exceptions.

*F. Peabody, E. K. Arnold & S. H. Batchelder*, for the defendant, submitted a brief.

*S. A. Fuller, (T. J. Ahern with him,)* for the plaintiff.

PIERCE, J. As submitted the case went to the jury on the third and fifth counts, the former of which in substance charged that the defendant failed to furnish the plaintiff with proper and safe implements and tools and a proper place to work, and the latter of which in substance charged that the defendant failed to notify the plaintiff of a danger which the plaintiff did not know, and which the defendant knew or ought to have known.

At the close of the evidence the defendant requested the court to rule:

"3. The plaintiff cannot recover under the third count of his declaration."

"5. The plaintiff cannot recover under the fifth count of his declaration."

"19. The defendant fulfilled its entire duty to the plaintiff, so far as this count [third] is concerned, if it provided suitable pipes and connections from which the employees could construct for themselves such steam pipes, connections and extensions as were necessary in the performance of the work.

"20. If the jury find that suitable pipes and connections were provided by the defendant and that they were put together negligently by the men themselves and such negligence caused the accident, then that would be merely the negligence of a fellow employee of the plaintiff and he cannot recover."

In its brief the defendant argues:

"I. The court should have directed a verdict for the defendant under the third count of the declaration.

"II. The court should have directed a verdict for the defendant under the fifth count of the declaration."

The uncontradicted evidence shows that the plaintiff sustained injuries by reason of the bursting of a steam pipe connected with an upright boiler of which he had charge. The boiler was installed in a shack which was erected about December 25, 1911, by the defendant, soon after the plaintiff entered its employment. In February, 1912, an upright three inch pipe, which conducted the steam from the top of the boiler, was connected by means of reducing bushings with a two inch pipe at or near the bottom of the boiler. The two inch pipe ran along the ground inside the shack from three to nine feet, under ashes; it then turned at right angles and ran about two feet through and to the outside of the shack, and then ran about twenty feet to a point five feet below the level of the shack. The lower end of the pipe rested upon a stone, which in turn rested upon snow and ice one or two feet in depth. At the stone, the two inch pipe was connected with pipes running at right angles to it, one extending in one direction one hundred and fifty feet, the other in another direction ninety feet. At the time of the accident the snow was pretty well gone under the stone support.

The jury could have found that the break at the point of con-

nection between the three inch and the two inch pipes was caused by the sagging of the pipe in consequence of the snow melting under the stone and causing a lack of sufficient and proper support of the pipes, or by reason of chemical action of the ashes on the pipe at the point of fracture, or as the result of the concurrent and combined action of both causes.

The evidence was undisputed that the particular boiler and shack was one of seven boilers and shacks, placed and installed at points best adapted to facilitate the distribution of steam used as power in the defendant's work of constructing a dam. Pipes were laid by the men, as needed, from the boilers to whatever point the power was to be applied. The pipes were constructed from pipe of "all lengths and descriptions" and were cut to suit the work. In addition to the pipe, there was kept and available for use a large supply of nipples, elbows and other fittings. The employees were expected to select the parts, join them, disconnect them, and cut them as the length and character of the pipe to be used required.

There is no evidence that any change in the location of a boiler and shack, once placed in position, was made or contemplated, or that a change in the use, length or direction of a pipe line necessitated or permitted an interference with the arrangement of the pipes connected with the boiler within the shack. The result is that while it properly may be said that the pipe lines, because of their transitory nature, are of the class of instrumentalities and appliances that may be left to the construction, supervision, care and oversight of servants or agents, it cannot be affirmed that a boiler and its connections are not permanent appliances when situated as this boiler and shack were. *Prendible v. Connecticut River Manuf. Co.* 160 Mass. 131. Nor can it be said that the master owed no duty to its servants to maintain the boiler and its connections in a reasonably safe condition or to warn those using them of dangers and perils attending their use. *Rice v. King Philip Mills*, 144 Mass. 229, 237.

The plaintiff entered upon the work in the boiler house on May 23, 1912, and was injured on May 24, 1912. There is no evidence to warrant a finding that he knew of or could have seen beneath the ashes the connection of the pipes, or the manner of their union. If he knew that sulphites in wet ashes would produce a chemical

action sufficient "to destroy the threads of the cast iron pipe, and would have a tendency to eat the iron away and thereby weaken it," he also knew and had the right to assume that the defendant had or might have by the exercise of reasonable care, equal knowledge of the certainty of such chemical action, and to believe as a fact in the absence of warning that the defendant had provided safeguards adequate to reasonably insure the continuance of the strength of a pipe which was intended to be subjected to ninety pounds pressure of steam.

Assuming that the break in the pipe was due in part to the failure of co-servants to perform a duty to provide continuous support to the pipe outside the shack, and in part to the neglect of the defendant to protect the pipe within the shack from corrosion, the plaintiff established a cause of action which was sufficiently alleged, and not improperly, although informally, described in his declaration. *Ferren v. Old Colony Railroad*, 143 Mass. 197. *Griffin v. Boston & Albany Railroad*, 148 Mass. 143, 145. *Myers v. Hudson Iron Co.* 150 Mass. 125. *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485.

The evidence did not warrant a ruling that the accident was due solely to the negligence of fellow servants in constructing or placing the pipes.

It follows that the request for rulings could not have been given.

The defendant also excepted to that portion of the charge in which the judge stated: "I draw a distinction between this kind of work, that is, a construction of this character and a temporary staging put about a building, however I may be wrong in relation to that."

The brief presents no argument intended to show that the defendant was harmed by the above quoted expression of opinion as to the permanency or otherwise of the pipes as laid or placed by the workmen, and the exception is assumed to be waived. *Howard v. Holman*, 203 Mass. 445, 448. *Maguire v. Pan-American Amusement Co.* 211 Mass. 22, 27.

We find no reversible error and the exceptions must be overruled.

*So ordered.*

IDA F. TOLMAN & another vs. BRADSHAW S. TOLMAN & others.

Middlesex. March 30, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Equity Pleading and Practice*, Waiver of right to appeal. *Attachment*, In equity. *Execution*, Under attachment in equity.

Where in a suit in equity with the assent in writing of the attorneys for the parties a decree is entered containing the recital, "the plaintiff and the defendant . . . severally waiving their rights to appeal therefrom," the right of appeal is waived under R. L. c. 159, § 34, and there can be no appeal from such a decree.

Under R. L. c. 167, § 56, which provides that "Property which has been attached in suits in equity shall be held for thirty days after the right of appeal from a final decree expires," where there is no right of appeal the right to levy execution under an attachment expires thirty days after the decree.

PETITION, filed in the Superior Court on January 3, 1913, for the partition of three parcels of land, one in Newton and the other two in Waltham, in which the petitioner claimed to own two undivided third parts.

The case was heard by *Hitchcock*, J., without a jury. The only issue that was tried before him was between the petitioner Ida F. Tolman and the respondent H. Adelaide Hovey as to which of them was entitled to the one third interest in the property in question that formerly was owned by Bradshaw S. Tolman.

It became material to determine whether Bradshaw S. Tolman had waived his right of appeal from a decree made on July 6, 1910, in a suit in equity brought against him and John A. Tolman by George E. Tolman of Everett, the petitioner's predecessor in title, because on August 27, 1910, George E. Tolman seized on an execution under the attachment in that suit all the interest of Bradshaw S. Tolman in the three parcels of land in question. By deed of October 9, 1907, Bradshaw S. Tolman had conveyed to H. Adelaide Hovey all his right, title and interest in the three parcels of land, subject to the attachment in pursuance of which the execution was levied.

There was put in evidence the following stipulation filed in that suit and signed by the attorneys for the plaintiff and by



the attorney for the defendants: "It is hereby stipulated and agreed that on July 1, 1910, a final decree may be entered for the plaintiff against the defendant, Bradshaw S. Tolman, in the sum of Four Thousand Eight Hundred and Twenty-seven and 64/100 (4827.64) Dollars with interest thereon from May 1, 1904, and with costs."

On July 6, 1910, the following decree was entered in that suit: "This cause came on to be heard at this sitting upon the application of the plaintiff for the entry of a final decree in accordance with the stipulation filed herein on or about December 21st, 1909, and thereupon, it appearing that the plaintiff and the defendant Bradshaw S. Tolman consented thereto, and the plaintiff and the defendant Bradshaw S. Tolman severally waiving their rights to appeal therefrom, it was and is ordered, adjudged and decreed that the defendant Bradshaw S. Tolman pay forthwith to the plaintiff the sum of Six Thousand, Four Hundred and Sixty-two 69/100 (6462.69) Dollars damages and that execution in the common form issue therefor." This decree was assented to in writing by the attorneys for the plaintiff and by the attorney for Bradshaw S. Tolman.

The petitioner asked the judge to make the following rulings:

"2. The petitioner Ida F. Tolman is the owner in fee simple of two undivided third parts of the land described in the petition."

"4. The attachment of the interest of Bradshaw S. Tolman had not lapsed on August 27, 1910.

"5. The decree of July 6, 1910, was not a 'consent' decree.

"6. It was open to either party to appeal from the decree of July 6, 1910.

"7. There is a right to appeal within the meaning of R. L. c. 167, § 56, even though the parties have made an agreement waiving the appeal.

"8. R. L. c. 167, § 56, prescribed a period of sixty days in which property attached should be held.

"9. There was not a waiver of appeal within the provisions of R. L. c. 159, § 34."

The judge refused to make any of these rulings, and made the following rulings:

"1. The attachment on December 16, 1905, of all the right which Bradshaw S. Tolman had in and to any real estate in the county

of Middlesex was a valid attachment of his undivided one third interest in the real estate in question.

"2. The stipulation filed in the equity suit against Bradshaw S. Tolman on December 21, 1909, which was signed by the attorney of Bradshaw S. Tolman, and the final decree which was entered on July 6, 1910, in conformity with the terms of the stipulation, constituted a decree which was consented to.

"3. The entry of the final decree, containing a recital therein that 'the plaintiff and the defendant Bradshaw S. Tolman severally waiving their rights to appeal therefrom,' was a sufficient entry of such waiver on the docket under the provisions of R. L. c. 159, § 34.

"4. There being no right of appeal from a decree consented to, and any right of appeal having been waived, and the decree having further provided 'that execution in common form issue therefor,' such execution could have been lawfully issued immediately after the entry of said final decree.

"5. The attachment against Bradshaw S. Tolman continued in force until the expiration of thirty days after the entry of said final decree, and, no levy having been made upon the property so attached within said thirty days, all rights under the attachment terminated at the expiration of said thirty days after July 6, 1910.

"6. The attempted levy and sale under the execution which was issued on August 6, 1910, was properly conducted, and if the same had been seasonably made would have been valid, and would have conveyed to George E. Tolman the undivided one third interest in said property which was owned by Bradshaw S. Tolman at the time of the attachment on December 16, 1905."

The petitioner excepted to all the rulings made by the judge except the first and sixth.

The judge made the following order for judgment:

"1. The petitioner Ida F. Tolman is entitled to have partition made as prayed for, and to have her interest in the premises described in her petition set out to her.

"2. The rights of all parties interested in the premises are as follows: Ida F. Tolman, one third; John A. Tolman, one third; and H. Adelaide Hovey, one third.

"3. That three commissioners be appointed and a warrant issued to them to make said partition."

The petitioner Ida F. Tolman alleged exceptions.

*J. B. Studley*, for the petitioner Ida F. Tolman.

*G. L. Mayberry*, (*F. A. Jenks* with him,) for the respondent Hovey.

LORING, J. The decree in question contains this recital: "the plaintiff and the defendant Bradshaw S. Tolman severally waiving their rights to appeal therefrom." That recital brings that decree within the provision of R. L. c. 159, § 34. A party to such a decree has caused an entry of his waiver of an appeal to be made on the docket within the provisions of that act. From such a decree there is no appeal. *Winchester v. Winchester*, 121 Mass. 127. See also in this connection *Washington National Bank v. Williams*, 188 Mass. 103.

It follows that the attachment had expired when execution was taken out more than thirty days after the date of the decree. Pub. Sts. c. 161, § 53. R. L. c. 167, § 56.

We find nothing in the cases relied on by the petitioner requiring special notice.

*Exceptions overruled.*

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ALFRED E. COLE, administrator, vs. CHANNING M. WELLS & others.

Worcester, March 31, 1916. — June 21, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Equity Pleading and Practice*, Amendment, Appeal, Plea. *Equity Jurisdiction*, Minority stockholders' bill. *Corporation*, Rights of minority stockholders, Officers and agents. *Waiver*. *Election*. Words, "Value of the stock."

If the plaintiff in a suit in equity appeals from an interlocutory decree sustaining a demurrer to the bill on the ground of multifariousness and afterwards by leave of court amends the bill so that the objection of multifariousness is removed, he waives his right of appeal.

If a defendant files an affirmative plea to a bill in equity and the plaintiff files no replication thereto, the facts well alleged in the plea are admitted by the plaintiff and the sole question on the plea is, whether as a matter of law, upon the facts therein well alleged and the facts well alleged in the bill and not denied in the plea, the suit can be maintained.

In St. 1903, c. 437, § 44, giving a stockholder in a corporation, who has voted against a sale by the corporation of all of its property and assets, a right, upon a demand in writing within thirty days after such vote, to receive "the value of

the stock " held by him which, if he and the corporation cannot agree thereto, shall be determined by appraisers, the words, "the value of the stock," mean not merely its market value if it is traded in by the public, but its intrinsic value, to determine which all the assets and liabilities of the corporation must be ascertained.

If the owner of twenty-three per cent of the capital stock of a corporation, having voted at a stockholders' meeting against action transferring all its property and assets and having made a demand in writing of the corporation for the value of his shares under St. 1903, c. 437, § 44, thereafter and while he is seeking to ascertain the real value of the shares discovers that the holders of the other seventy-seven per cent of the stock by conspiring together fraudulently have misappropriated to themselves large sums of money belonging to the corporation under the guise of salaries which were grossly exorbitant and greatly in excess of the fair value of the services rendered, have managed the affairs of the corporation to their personal profit and have so manipulated and falsified its books as to conceal their fraud and to obscure the true state of the corporation's assets; and if about seventeen months after making such discovery the minority stockholder agreed with the majority stockholders to submit the matter of the appraisal of the value of his shares to three men then selected and determined upon as arbitrators under the above statute, but no hearings are held before such arbitrators, the minority stockholder has not thereby elected to waive his right to maintain a suit in equity to compel an accounting and restitution by the majority stockholders.

The right given by St. 1903, c. 437, § 44, to a minority stockholder to compel a corporation, the majority of whose stockholders against his vote have voted to transfer all of its property and assets, to pay him the value of his shares, and his right, pending such payment to him, to compel an accounting by the majority stockholders who, while in control of the corporation, have misappropriated its property and manipulated and falsified its accounts so as to conceal their fraud and to make it difficult if not impossible to ascertain the true state of the corporation's assets, are not inconsistent but are concurrent.

Until such a minority stockholder has been paid the value of his shares, determined as provided by the statute, he still is a stockholder and has a right to pursue in equity his rights as such minority stockholder in behalf of the corporation against the majority stockholders to compel an accounting and restitution by them; because as a stockholder he is entitled to any enhancement in the value of his shares due to such restitution.

The scope of a bill in equity is to be determined by its allegations and not by its special prayers for relief.

If the owners of seventy-seven per cent of the capital stock of a corporation, who are its officers and are in full control of its affairs, cause a meeting of the stockholders to be called and in pursuance of a vote there taken against the vote of the owner of twenty-three per cent of the stock sell all of its property and assets to themselves to hold and manage under a trust which was not intended nor calculated by them to be in the interests of the corporation and of all of the stockholders but was deliberately planned and accomplished for the sole purpose of enabling them to acquire the property of the corporation for their own benefit and to protect and secure themselves against any attempt on the part of the corporation or of the minority stockholder to compel an accounting by them and a restoration of moneys theretofore wrongfully misappropriated by them and to enable them to carry on and enlarge the business for their sole per-

sonal advantage, such conduct is a deliberate fraud upon the corporation and the minority stockholder and he can maintain a suit in equity in his own behalf and in behalf of the corporation to set aside the transfer and to compel an accounting and restoration by the majority stockholders.

**BILL IN EQUITY**, filed in the Superior Court on December 24, 1914, by the administrator of the estate of Robert H. Cole, late of Southbridge, the owner of twenty-three per cent of the capital stock of the American Optical Company, a Massachusetts corporation, against the owners of the other seventy-seven per cent of the stock, who were the officers and were in full control of the corporation, and against the corporation.

The allegations of the bill, so far as material to the decision, were in substance that the individual defendants and George W. Wells, since deceased, after acquiring the full control of the affairs and business of the American Optical Company, desiring and intending to obtain for themselves a greater share of the profits of the corporation than they were rightfully entitled to as stockholders, and to induce and compel the other stockholders to sell their stock to them at much less than its fair value and ultimately to acquire all the capital stock of the corporation and to become possessed of all its business, good will and property at much less than the fair value thereof, conspired together to use their control of the corporation for the accomplishment of their purpose, and so to manage and direct its affairs as to promote their own private gain in disregard of their duties as officers and stockholders and in fraud of the rights of the corporation and of its other stockholders; that to that end they appropriated to themselves large sums out of the profits of the corporation under the guise of special salaries, which were grossly exorbitant and greatly in excess of the fair value of the services rendered therefor; that they concealed from the other stockholders the fact of such misappropriation, amended the by-laws so as to give themselves power to vote such salaries, and so kept the books that such payments did not appear as salaries and so that "it was difficult, if not impossible," to determine from the accounts of the concern the amounts so drawn; that by false entries they concealed from the other stockholders the actual profits of the corporation's business, which were very large, and the actual amount of its assets; and that in many other ways, the details of which the plaintiff was

unable to state, they took advantage of their exclusive control of the corporation to promote their own private interests at the expense of the corporation, in disregard of their duties as its officers and in fraud of the rights of the other stockholders and of the plaintiff; that, having acquired all of the capital stock excepting that owned by the plaintiff, the defendants and George W. Wells by false representations to the plaintiff sought to induce him to sell to them his shares at a price far below their real value; that, failing in their attempt, and in pursuance of their fraudulent purpose of appropriating to themselves more than their just share of the profits and assets of said corporation, they called a meeting of the stockholders on March 23, 1912, to take action with reference to selling or disposing of all the assets and business of the company; that at that meeting they voted to sell the entire assets of the corporation to themselves as trustees in exchange for certificates of common and preferred shares in the trust.

The bill alleged that the terms of the trust were a fraud upon the corporation and its stockholders and that the consideration given for the transfer was grossly inadequate in "that (1) it was based on book values which had been purposely made by the purchasers to appear far below the actual values, (2) it took no account of the large sums of money which the respondents are in equity and good conscience bound to restore to the corporation because wrongfully taken from it, (3) it took no account of the great value of the patents, trade-marks and secret processes owned by the corporation and of which no inventory or appraisal appeared upon its books, (4) it took no account of the good will and trade-name of the business which were of very great value, and (5) it substituted for the valuable assets and good will of the corporation certificates or shares in a trust which was purposely so framed as to render the said shares of little market value to anyone except the respondents themselves who as trustees have had the complete control and direction of the trust."

The bill also alleged that the individual defendants made the transfer on March 23, 1912, for the "purposes (among others) of (1) securing themselves against any attempt on the part of the corporation or its stockholders to require an accounting from them of the sums wrongfully appropriated by them as heretofore set forth, (2) obtaining an apparent ratification and acceptance by

the corporation and its stockholders of the inadequate book-values of its assets of approximately \$2,100,000, (3) compelling any dissenting stockholder to accept as the value of his stock the amount it might be found to be worth upon the assumption that said nine thousand of preferred and twelve thousand of common shares in said trust fairly represented the entire assets of the concern, and (4) obtaining a more complete control over the business and assets of the concern than they could safely exercise as officers of the corporation, and so appropriating to themselves more than their just share of its profits and property;" and that after the transfer the defendants continued to make large profits from the business of the corporation and the plaintiff has received nothing as dividends.

The bill further alleged, in the twentieth paragraph, that the plaintiff at the stockholders' meeting on March 23, 1912, voted against the action of the defendants and thereafter, being unwilling to accept in place of his stock his proportionate part of the shares in the trust to be received by the corporation in payment for its property and business, he, within thirty days after the date of the meeting, made a demand in writing upon the corporation for payment for his stock, in accordance with the provisions of St. 1903, c. 437, § 44. In negotiating thereafter with the individual defendants as officers of the corporation for the purpose of fixing the value of his stock, the plaintiff was so dissatisfied with the value thereof as represented to him by them, that he employed an expert accountant to go over the books of the corporation and report to him the data required for forming an intelligent estimate of the value. He received the first preliminary report of the accountant on January 8, 1913, and his final report September 30, 1913.

The bill further alleged that not until April 11, 1913, did the plaintiff become aware of the fraudulent acts and conspiracies above described, and that, because of the way in which the books of the corporation had been kept and the business had been conducted, he ever since had been and still was unable to get a full statement of the value of the property and assets of the corporation as they stood at the date of the transfer to the trustees although he had at all times diligently sought to do so; and that, after he became aware of the facts which he had alleged, he sought unsuccessfully to get the corporation to avail itself of its rights in

the premises but was unsuccessful because the individual defendants were in complete control of the corporation.

- In the twenty-fourth paragraph of the bill the plaintiff alleged that he had "become entitled, under the provisions of St. 1903, c. 437, §44, to have the value of his stock determined either by agreement with the corporation or by a board of appraisers. But because of the wrongful acts of the defendants above set forth it is impossible to reach a just or accurate appraisal of said stock until the accounting prayed for in this bill is had, so that the true value of the assets of the corporation, and so the true value of said stock, may be justly determined."

The prayers of the bill were for a restoration to the corporation of the money improperly appropriated by the individual defendants under the guise of salaries and for an accounting by them of private benefits improperly received either individually or as trustees; that the full value of all the property, assets and business of the corporation taken over by the defendants as trustees, "including all patents, patent rights, secret processes, trademarks, trade-names, good will and going concern values," be ascertained and determined, and that they be ordered to account to the corporation for the amount thereof; and, in the fifth prayer, that the defendants be ordered to pay to the plaintiff in exchange for his stock his proportionate part of the amount determined upon as the value of the property, assets and business of the corporation.

The defendants demurred, alleging eleven grounds of demurrer. The demurrer was heard by *Morton, J.*, and an interlocutory decree was entered which sustained the demurrer upon the eleventh ground, which alleged that the bill was multifarious in that it combined two unrelated causes of action founded upon distinct rights, the plaintiff in the same bill claiming as a minority stockholder a right to enforce against the individual defendants an alleged cause of action in behalf of the corporation, and also claiming a right as a creditor to enforce his alleged rights under St. 1903, c. 437, §44, and under his demand to receive a proportionate part of the value of all the assets of said corporation. On all other grounds the demurrer was overruled. Both parties appealed from the decree.

The plaintiff then amended the bill, striking out the twentieth



and twenty-fourth paragraphs of the bill and the fifth prayer, and substituting a new twentieth paragraph alleging that at the meeting of the stockholders of the corporation on March 23, 1912, the plaintiff voted against the action then taken; that thereafter he had certain negotiations with the individual defendants as officers of that corporation for the purpose of ascertaining the value of the property and assets, and, being dissatisfied with the information he was able to obtain from them, he employed expert accountants to go over the books of the corporation and obtain the data required for forming an intelligent estimate of said value, and that he received the first preliminary report of the said accountant on January 8, 1913, and his final report September 30, 1913. The bill further was amended by adding the administrator of the estate of George W. Wells as a defendant.

The defendants filed a plea to the bill, alleging the negative vote of the plaintiff's stock at the corporation meeting of March 23, 1912, and his demand under the statute to be paid the full value of his stock, and continuing as follows:

"On or about October 1, 1914, the defendant corporation, at the request of the plaintiff who was then fully informed and advised regarding all the facts of which he complains in his bill and in consideration of the mutual promises then exchanged between the defendant corporation and the plaintiff, that they would submit the plaintiff's claim, including all claims of the plaintiff with respect to excessive salaries drawn by the defendants and George W. Wells, to arbitration, then and there agreed to arbitrate said claim as by Section 44 of said Chapter 437 of the Acts of 1903, and the defendant corporation and the plaintiff, on or about the date last above named, agreed upon James R. Dunbar of Boston, Alonzo R. Weed of Newton, and Daniel G. Wing of Boston, three disinterested persons to ascertain the value of such stock as provided by said chapter, and mutually agreed upon the compensation to be paid said disinterested persons, and further agreed to submit the claim of the plaintiff upon the defendant corporation for the value of his stock, together with all facts that might be material or important to said arbitrators during the week beginning October 28, 1914. The defendant corporation has at all times been ready and willing and has offered to submit the plaintiff's claim to the decision of said arbitrators and to abide by their

appraisal and to pay their award within thirty days after the same was made and has offered and attempted and endeavored to submit the same, but the plaintiff has wholly refused and neglected and still refuses and neglects to carry out said agreement to arbitrate."

The defendants also, without waiving their plea, demurred to the bill as amended for want of equity, for laches, because the plaintiff had an adequate remedy at law, and because the bill showed that the plaintiff at his own election ceased to be a stockholder and became a creditor.

There was no replication to the plea and it and the demurrers were heard by *Morton, J.*, by whose order an interlocutory decree was entered adjudging the plea insufficient in law and overruling the demurrers, from which the defendants appealed. Thereafter the judge, being of the opinion that the orders and decrees appealed from so affected the merits of the controversy that the matters involved therein ought, before further proceedings, to be determined by this court, reported the case for that purpose.

*G. L. Mayberry, (E. H. Vaughan & J. C. F. Wheelock with him,)* for the plaintiff.

*C. F. Choate, Jr., (J. Garfield with him,)* for the defendants.

**BRALEY, J.** The bill, as originally framed, charged the defendants as directors with having wrongfully appropriated funds of the corporation to a large amount for their own personal benefit, and also that at a meeting of the stockholders, duly called to take action on a plan proposed by the directors to transfer all the assets of the corporation to themselves as trustees to hold under the declaration of trust, a copy of which is annexed to the bill, the plaintiff representing a minority of the capital stock, having voted against the transfer, thereafter made a demand in writing upon the corporation in accordance with the provisions of the St. 1903, c. 437, §§ 3, 44, which read as follows: "A stockholder in any corporation which shall have duly voted to sell, lease or exchange all its property and assets or to change the nature of its business in accordance with the provisions of section forty, who, at the meeting of stockholders, has voted against such action may, within thirty days after the date of said meeting, make a demand in writing upon the corporation for payment for his stock. If the

corporation and the stockholder cannot agree upon the value of the stock at the date of such sale, lease, exchange or change, such value shall be ascertained by three disinterested persons, one of whom shall be named by the stockholder, another by the corporation and the third by the two thus chosen. The finding of the appraisers shall be final, and if their award is not paid by the corporation within thirty days after it is made, it may be recovered by the stockholder from the corporation in an action of contract. Upon payment by the corporation to the stockholder of the agreed or awarded price of his stock, the stockholder shall forthwith transfer and assign the stock certificates held by him at, and in accordance with, the request of the corporation."

But, having as he further alleges made the demand before he had any knowledge of the misappropriation by and fraudulent management of the directors, he also sought to maintain the suit as a minority stockholder.

The defendants having demurred, the demurrer was sustained on the sole ground of multifariousness. While the plaintiff appealed from the interlocutory decree, he subsequently amended by striking out the twenty-fourth and modifying the twentieth paragraphs relating to the demand for an appraisal and omitting the corresponding prayer for relief. By the allowance of this amendment he waived his appeal. It related back to the filing of the bill, and the amended bill became the original bill. *Hurd v. Everett*, 1 Paige, 124.

The defendants, however, demurred to the amended bill and also filed a plea. We first consider the plea. It is a pure or affirmative plea, relating only to proceedings to be taken by a dissenting stockholder under the St. of 1903, c. 437, § 44, and states matters not apparent on the face of the bill as amended. Story, Eq. Pl. (8th ed.) § 660. The object being to defeat the bill without resort to a general answer, and the plaintiff not having filed a replication, the facts stated in the plea are admitted, but their sufficiency as matter of law to bar recovery is denied. *Farley v. Kittson*, 120 U. S. 303.

A minority stockholder, if he votes against the action taken by the corporation, is entitled under the statute to "payment for his stock." If the corporation and the stockholder cannot agree, the value is to be ascertained by disinterested arbitrators. It is obvious

that "the value of the stock" means not merely the market price if the stock is traded in by the public, but the intrinsic value, to determine which all the assets and liabilities must be ascertained. The stockholder as well as the arbitrators, if arbitrators are appointed, ordinarily must resort to the books of the corporation for information, although a condition of affairs may exist where the books of themselves would fail to exhibit the true financial condition of corporate affairs.

It is specifically alleged in the bill that the directors holding nearly four fifths of the capital stock, while the plaintiff held the remaining shares, in violation of the by-laws voted themselves salaries "grossly exorbitant and greatly in excess of the fair value of the services they rendered" and that not only were such misappropriations concealed from the stockholders including the plaintiff, but being in complete control of the corporation, they managed its affairs for their own personal profit, and the books of the company were so manipulated and falsified, that it was "difficult, if not impossible, to determine from the accounts of the concern the amounts so drawn" or appropriated.

A further and important allegation appears, that "because of such acts of concealment your complainant did not know what the profits of the company were, and was totally ignorant of the fact that these enormous salaries had been taken from the profits of the concern, and remained in ignorance thereof until some time after the attempted sale," meaning the transfer under the declaration of trust.

And these allegations not being contradicted by the plea are admitted to be true. *French v. Shotwell*, 5 Johns. Ch. 555. 10 R. C. L. Equity, §223. The statutory option given to a dissatisfied stockholder is either to acquiesce or to accept the fair value of his stock and retire from the corporation. If he retires the valuation on which payment is to be made is not what the majority stockholders may be willing the corporation should pay, but is to be ascertained as if liquidation had been voted and all the corporate property after the payment of debts had been marshalled for the benefit of all the stockholders. It is plain that the defendants through their control of the corporation cannot compel the plaintiff, who was ignorant of their misdoings, to accept payment for his stock upon a valuation of the assets which excludes

the amounts misappropriated. A demand under such circumstances cannot be held to have the force and effect of the demand contemplated by the statute, and there was no irrevocable election, as the defendants contend, to receive payment upon a valuation to be fixed by agreement of parties, or by arbitration, whereby all demands for an accounting or proceedings to set aside the transfer as violative of his just rights as a dissenting or minority stockholder were waived.

The right moreover to demand payment and the right to seek relief in equity in aid of the demand are not inconsistent but concurrent, and under such circumstances there is no necessity for an election. *Mason v. Mason*, 4 Sandf. Ch. 623, 632. *Barnett v. Philadelphia Market Co.* 218 Penn. St. 649. *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 724.

But even if the plaintiff could be deemed to have elected, he remained a stockholder until payment by the corporation for his stock at the agreed or awarded price, with the right if necessary to maintain a minority stockholder's bill for an accounting and the restoration to the corporation of the unlawful gains and profits obtained by the defendants while acting in a fiduciary capacity. The enhancement of assets from this source manifestly would result in the enhancement of the price or value of his stock. *Douglass v. Concord & Montreal Railroad*, 72 N. H. 26. *Barnett v. Philadelphia Market Co.* 218 Penn. St. 649. *Colgate v. United States Leather Co.* 3 Buch. 72, 98. *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 724. *Mason v. Pewabic Mining Co.* 133 U. S. 50. *In re Imperial Bank of China, India, & Japan*, L. R. 1 Ch. 339, 347. *In re Consolidated South Rand Mines Deep, Ltd.* [1909] 1 Ch. 491. *Thompson, Corp.* (2d ed.) § 6060.

The defendants by their demurrer admit all the material allegations which are well pleaded, and the scope of the bill is to be ascertained from its frame and not by the special prayers for relief. *Fordyce v. Dillaway*, 212 Mass. 404, 411. It is settled that the amended bill can be maintained to compel the defendants to make restitution of all moneys misappropriated and for which they were jointly and severally liable to the corporation at the date of transfer. *Von Arnim v. American Tube Works*, 188 Mass. 515. *United Zinc Companies v. Harwood*, 216 Mass. 474, 476, 477, and cases cited.

But if the grounds of demurrer, that the bill does not state a case for equitable relief and that, the option given by statute to a dissentient stockholder being exclusive, the remedy at law therefore is plain and adequate, are not well taken for reasons sufficiently stated, and the bill on its face fails to show such delay as to preclude the plaintiff, the demurrants further urge that he cannot maintain the bill to set aside the transfer. *Manning v. Mulrey*, 192 Mass. 547. *Daly v. Foss*, 199 Mass. 104. *Douglass v. Concord & Montreal Railroad*, 72 N. H. 26, 31.

The bill alleges that the defendants, having acquired virtual ownership and control of all the stock of the corporation excepting the small percentage owned by the plaintiff, caused a meeting of the stockholders to be called to take action with reference to selling or disposing of all the assets and business of the company, and the vote thereupon passed that the company sell all its property and assets including its good will to the defendants to hold and manage under the declaration of trust was not intended to be a transaction in the interests of the corporation and the stockholders, but was deliberately planned and accomplished for the sole purpose of enabling the defendants to acquire for their own benefit the property of the corporation, and to protect and secure themselves against any attempt on the part of the corporation or of the plaintiff to seek and compel an accounting of the moneys theretofore wrongfully appropriated, and to enable them to enlarge and carry on the business beyond the chartered powers of the company solely for their own personal advantage, as well as to retain under the guise of a trust with certificates of preferred and common stock a greater share of the profits than they would have obtained if the transfer had not been made. A transaction of this character, promoted and consummated by the directors who were also the majority stockholders, was a deliberate fraud upon the corporation and the plaintiff. The vote and transfer cannot bar the right of a dissentient stockholder, who has no remedy within the corporation because the wrongdoers are in full control, from maintaining a bill in equity in its behalf to have the transfer set aside and for an accounting. The property and profits when recovered constitute assets of the corporation. *Brewer v. Boston Theatre*, 104 Mass. 378. *Greenfield Savings Bank v. Simons*, 133 Mass. 415. *Warren v. Para Rubber Shoe Co.* 166 Mass. 97. *Von*

*Arnim v. American Tube Works*, 188 Mass. 515. *United Zinc Co. v. Harwood*, 216 Mass. 474, 476. *Smith v. Bank of Victoria*, 41 L. J. P. C. 34. 7 R. C. L. Corporations, §§ 287, 609.

The result is that the interlocutory decrees overruling the demurrer to the original bill on all grounds except for multifariousness, and the demurrer to the amended bill, and adjudging the plea to be insufficient in law, from which the defendants' appealed, are affirmed.

*Ordered accordingly.*

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WILLIAMS A. NEWCOMB *vs.* TIMOTHY PAIGE.

Worcester. April 5, 1916. — June 21, 1916.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

*Tax*, Upon trust property. *Trust*, Taxation. *Comity*. *Statute*, Construction. *Constitutional Law*.

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts; and interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words.

The provisions of St. 1909, c. 490, Part I, § 23, cl. 5, display no such legislative intention.

In the present case the beneficiary under the trust was a resident of this Commonwealth, but a tax on one third of the trust fund was assessed to the trustee resident here and not to the beneficiary, and it *was stated* that it therefore was not necessary to consider the aspect of the statute which would have been presented if the tax were assessed to the beneficiary.

*Whether* a statute showing a plain and unequivocal intention of imposing a tax under the above circumstances would be constitutional, was not considered in this case.

CONTRACT by the collector of taxes of the town of Hardwick against one of three trustees under the will of Calvin Paige, late of the city of New York, who held a trust fund for the benefit during his life of one Joseph C. Paige, also a resident of Hardwick,

for a tax of \$525 on one third of the trust fund, alleged to be due under the provisions of St. 1909, c. 490, Part I, § 23, cl. 5. Writ dated August 2, 1912.

The case was heard upon an agreed statement of facts by *Fox, J.*, without a jury. The material facts are stated in the opinion. He found for the plaintiff in the sum of \$623.71, and at the request of the parties reported the case for determination by this court.

The case was submitted on briefs.

*G. D. Storrs*, for the defendant.

*E. H. Vaughan, E. T. Esty & J. Clark, Jr.*, for the plaintiff.

*J. S. Darcy* (of New York), for the trustees under the will of Calvin Paige, by permission of the court submitted a brief.

RUGG, C. J. This is an action by the tax collector of the town of Hardwick to recover a tax assessed to the defendant for the year 1911. The pertinent facts are that the defendant, a resident of Hardwick in this Commonwealth, together with one Monteagle, a resident of California, and one Wright, a resident of New York, was appointed an executor of and a trustee under the will of Calvin Paige, who was domiciled at the time of his decease in the city of New York. They were duly appointed to this trust by the appropriate court of the State of New York. They have not been appointed by the courts of this or any other State except New York. These executors, in accordance with the will, paid to themselves as trustees a legacy of \$150,000, to be held during the life of Joseph C. Paige, also a resident of Hardwick, for his benefit. This trust fund was invested in intangible securities, a part of which are not subject to direct taxation in the State of New York, and a part of which are so subject to taxation, and as to this part a tax was paid in that State for the year 1911. So far as taxable the fund as a whole is there subject to taxation. All the securities, documents and other evidences respecting the trust at all times since the creation of the trust have been kept physically in New York in the exclusive custody and control of the trustee there resident, by concurrent assent of all the trustees. Under the law of the State of New York the trustees must act as a unit and all power possessed by them must be exercised by them as a body; and the trust fund still forms a part of the estate of the testator, and if the trust should fail for want of takers, the property would become vested in the Supreme Court of New York to be distributed



according to law. The law of New York relative to the taxation of personal property kept within that State in the hands of executors and trustees appointed by the courts of that State is in substance that when the will of a deceased resident of the State of New York appoints as executors and trustees a resident of the State of New Jersey and two residents of the State of New York, the amount of an assessment for personal property under the control of the executors and trustees in the State of New York is not by reason of the non-residence of the third executor and trustee limited to two thirds of the amount of such personal property, but extends to the whole. *People v. Wells*, 94 App. Div. (N. Y.) 463, 465, affirmed in 179 N. Y. 566. We interpret this statement of the law of New York to mean that all personal property held by executors and trustees appointed by the courts of New York acting within their jurisdiction and actually situated in the State of New York is taxable there in case such property is held by executors or trustees one or more of whom reside in the State of New York and one or more of whom reside in another State. *People v. Gaus*, 169 N. Y. 19.

This statement of facts shows that in substance and effect, where one or more of several trustees is a resident of New York and the securities in which the trust is invested are kept physically in New York, the laws of New York have established a kind of custody in the courts of that State for a trust fund administered as is the one at bar, and a domicile of the trust fund for purposes of taxation, with the trustee resident in that State.

The Massachusetts tax law apparently was not phrased with a view to the exact situation here presented. But in clause 7 of § 23, Part I of St. 1909, c. 490, the right of the Legislature to establish a domicile for an estate in process of settlement in the Probate Court is asserted by a provision to the effect that personal property of a deceased resident shall be assessed to the estate until after the appointment of an executor or administrator, and then to such executor or administrator for three years (unless sooner distributed and the statute complied with) "in the city or town in which the deceased last dwelt." It would be a hard thing to say that a non-resident executor or administrator might be taxed lawfully for the same property at his domicile on the theory that the title to such personal property was in him. Seem-

ingly it also would be difficult to deny to the Legislature power to enact that a trust fund held by one or more resident and one or more non-resident trustees under appointment from our courts, to be administered according to our law, should not have a domicile for taxation purposes within this Commonwealth. The maxim *mobilia sequuntur personam* is of general application. *Kirtland v. Hotchkiss*, 100 U. S. 491, 497. *State Tax on Foreign-held Bonds*, 15 Wall. 300. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 57, 60. But there are numerous cases where it is held that a State may establish a taxation *situs* for personal property intangible in nature physically within its control, although this may not always and necessarily exclude taxation by the State of the domicile of the owner. See, for example, *Liverpool & London & Globe Ins. Co. v. Assessors for the Parish of Orleans*, 221 U. S. 346, and cases there collected. The provisions of clause 5 of § 23 of the tax act,\* read in the light of the entire act and of the general principles of law as to taxation, do not subject to a property tax here personal property held by several trustees, only one of whom is a resident of this Commonwealth, under appointment of the court of a sister State of the Union by virtue of the will of a testator resident in that State, to be executed according to its law and actually deposited and continuously kept in such foreign State in the hands of a co-trustee there resident, where it is subject to taxation and a tax there is paid on its account. The final sentence of the clause, to the effect that when the trustee is not a resident of this Commonwealth, the fund shall be "assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other State," is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of

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\* St. 1909, c. 490, Part I, § 23. "Fifth, Personal property held in trust by . . . trustee, the income of which is payable to another person, shall be assessed to the . . . trustee in the city or town in which such other person resides, if within the Commonwealth; and if he resides out of the Commonwealth it shall be assessed in the place where the . . . trustee resides; and if there are two or more . . . trustees residing in different places, the property shall be assessed to them in equal portions in such places. . . . If the . . . trustee is not an inhabitant of the Commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other State."

another State and there making a just contribution to the support of government, should not be made liable to another tax here. The theory of official residence of an executor or trustee at the county seat or within the jurisdiction of his appointment apart from some express provision of the taxing statute finds no support in our cases although adopted in some jurisdictions,\* and is not supported by the weight of authority. *Welch v. Boston*, 221 Mass. 155, and cases collected at page 161. But a State by law may establish a taxing jurisdiction over a trust fund of personal property created by wills of its residents, administered by appointees of its own courts, evidences of title, securities and assets of which are kept within its borders in the possession of a resident trustee, although sharing such fiduciary duty with non-resident associates. When that is the law of a sister State, as in the case at bar, interstate comity would require plain and unequivocal statutory words to indicate an intention by the Legislature to subject such trust property to taxation in this State, simply because of the residence here of one of several trustees. *Johnson v. City Council of Oregon City*, 3 Ore. 13. *Rand v. Pittsfield*, 70 N. H. 530.

When there are several trustees, one or more of whom is domiciled in the State of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicile, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such several ownership in one trustee resident outside the State of the establishment of the trust, but resident in Massachusetts, as brings him within the scope of our tax law as to the trust property. St. 1909, c. 490, Part I, § 23. Under these circumstances he alone as resident of this Commonwealth does not hold the title as owner within the Commonwealth in such sense as to bring him within the terms of the tax act. He cannot exercise ownership as a resident in this Commonwealth, but only by conjoint action with his fellow trustees, none of whom are resident here, as to a fund in substance in the custody of the courts of another jurisdiction. His ownership is not of such character as to bring the taxable domicile of the trust within the terms of our law.

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\* *Gallup v. Schmidt*, 154 Ind. 196, 200. *Commonwealth v. Peebles*, 134 Ky. 121, 125. *Goodsite v. Lane*, 72 C. C. A. 281.

The practical consequences of taxation of the entire trust fund by each State in which one of a number of trustees might live cannot be overlooked. A fund designed to benefit relatives and kindred might by diversity of laws as to taxation and exemptions in such instances be greatly depleted in income by the payment of taxes and prove a barren benefaction. Such an interpretation of the tax law ought not to be given unless required by words of unmistakable meaning. See *Kingsbury v. Chapin*, 196 Mass. 533.

The case at bar is distinguishable from *Welch v. Boston*, 221 Mass. 155, where all the trustees resided in Massachusetts and nothing appeared as to the law of the State where the trust was established. It is also different from *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, where the owner of shares of corporate stock was held subject to taxation notwithstanding the laws of the State of domicile of the corporation.

The tax in the case at bar is not assessed to the beneficiary and it is not necessary to consider that aspect of the tax law.

The present statute does not go to the length of expressing a clear intent to levy a tax upon the defendant in respect of the New York trust under the circumstances here disclosed. It is unnecessary to discuss the constitutional questions which in that event would arise.

*Judgment for the defendant.*

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JULIA A. McCARTY vs. MARY CAVANAUGH & others.

Middlesex. May 15, 1916. — June 21, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

*Fraternal Beneficiary Association. Words, "Secede," "Disband."*

A national association, formed "to create and having control over" State and local organizations, "and to provide for and comfort the sick and distressed members of the order," is a fraternal beneficiary association and is not a charitable organization.

In this suit in equity by the proper officer of a national fraternal beneficiary association against former officers of a subordinate lodge for the possession of certain property formerly of that lodge, the plaintiff contended that he was entitled to the property by reason of a law of the association and of the lodge which

provided that, upon a lodge disbanding, such property should be turned over to him; but, upon facts found by a master to whom the suit was referred, it appeared that the lodge by a unanimous vote of its members had seceded from the national organization, and, there being no provision of the laws applicable to a secession of a lodge by a unanimous vote of its members, it was *held* that secession was not disbanding and, the provision as to a lodge disbanding therefore not applying, the suit was dismissed.

CROSBY, J. This is a suit in equity brought by the financial secretary of the Grand Circle of Massachusetts, Companions of the Forest of America. This association known as Companions of the Forest of America is national in its scope, and consists of what is called the Supreme Circle, which is the governing body, and of Grand Circles organized in different States; also local or subordinate circles. Each of these circles is a voluntary association having its own by-laws. See *Curran v. O'Meara*, 211 Mass. 261.

In May, 1891, a subordinate circle was organized in Marlborough in this Commonwealth under the name of "Pride of the Forest Circle, No. 134, Companions of the Forest of America." Owing to disagreements which existed between the members of Circle No. 134 and officers and members of the Grand Circle of Massachusetts, the members of Circle 134, by its financial secretary, notified the plaintiff by letter dated September 14, 1909, that Circle 134 "unanimously voted to secede from the order of the Companions of the Forest of America at a special summoned meeting Tuesday evening September 14, 1909."

The case was referred to a master who found that on September 14, 1909, Circle 134 was subject to the constitution and by-laws of the Supreme Circle, and was also subject to the jurisdiction of the Supreme Circle and of the Grand Circle.

This bill is brought for the purpose of obtaining possession of certain property, including the amount of a deposit held by the Marlborough Savings Bank, the principal question now in issue between the parties being the ownership of the money so held by the bank.

The questions presented by the appeal from the final decree are, whether the judge of the Superior Court before whom the case was heard,\* was right in sustaining the defendant's fifth and seventh exceptions to the master's report and in directing that the bill be dismissed.

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\* *Jenney, J.*

It is plain that the Companions of the Forest of America is a fraternal beneficiary association; therefore, the judge was right in sustaining the fifth exception. The master was wrong in finding that it was a charitable organization.\*

The seventh exception was based upon the objection "For that the master finds † and rules on the evidence set forth in said report that Circle 134, while not following all the rules specifically, in fact, did disband; whereas he ought to have found and ruled that Circle 134 seceded from the Companions of the Forest of America but did not disband." The decision of the judge in sustaining this exception is in effect a finding and ruling by him that Circle 134 seceded from the association but did not disband. We are of opinion that upon the evidence set forth in the master's report, the judge was right.

The plaintiff relies upon Section 13 of Article 15 of the Supreme Circle laws, which is as follows: "In the event where a circle is about to disband, the Circle Deputy, Chief Companion or Financial Secretary shall notify in writing all the members of the Circle to attend a special summoned meeting, at which meeting the question of the disbanding of the Circle shall be considered. A written yes or no ballot shall be taken as to the disbanding of the Circle; if the number voting against the disbanding is not sufficient to warrant the continued existence, the charter, rituals and paraphernalia shall be surrendered to the Circle Deputy, who shall at

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\* The fifth exception was based upon an objection that the master found "that the Companions of the Forest of America is a charitable association, whereas he ought to have found it is a fraternal beneficiary association." The master's finding was as follows: "Under the title 'name and objects' in the preamble to the 'Constitution and General Laws Supreme Circle' are the following: — 'The name of the Order shall be the Companions of the Forest of America,' having for its object 'to create and having control over Grand and Subordinate Circles of the order' 'and to provide for and comfort the sick and distressed members of the order.'"

† The master's finding was as follows: "The use of the word 'secede' rather than the word 'disband' does not seem to be of much significance, apparently Circle 134 attempted to act under Sec. 13 for in the letter of Sept. 14, 1909, the vote was declared to have been taken at a 'special summoned meeting,' and no question was made as to its being a fact that the vote was taken at such meeting, all parties and witnesses seemed to so consider the vote. I find on this evidence and report that the Circle, while not following all the rules specifically, in fact, did disband."

once return them to the Supreme Circle. All moneys in the Sick and Funeral and Benevolent Funds of said Circle shall be paid to the Supreme or Grand Circle Financial Secretary, said moneys to be applied to the Management Fund of the Supreme Circle, and to be used for the payment of sick and funeral benefits of members of delinquent or suspended Circles who are on the rolls of the Supreme or Grand Circles, as provided for in these laws."

The plaintiff contends that the members of Circle 134 attempted to act under Section 13 of Article 15, and the master so found; but the judge by sustaining the defendant's seventh exception came to a contrary conclusion. Unless the subordinate Circle 134 disbanded on September 14, 1909, it is plain that the plaintiff is not entitled to the funds.

It is apparent that this section in terms applies to a case where a circle is about to "disband" but does not refer to a circle which secedes from the association. We think the finding in effect of the judge that the Circle did not disband as provided in this section was justified.

Article XI, Section 11, was adopted doubtless to protect minority members in case of secession as well as of abandonment of a circle. That section is as follows: "In the event of the dissolution, seceding or disbanding of a Circle, any beneficial member of the Circle who voted in the minority against their Circle disbanding or seceding or from being suspended for non-compliance with the laws of the Order, shall, upon satisfactory proof being made thereof to the Supreme Chief Companion, be recognized as a member of the Order, and in the event of their not being able to obtain admission into any other Circle of the Order in consequence of ill health or over age, such members shall pay dues similar in amount to those paid by them in the Circle of which they were members to the Supreme Circle through the Supreme Financial Secretary, and in case of sickness or death of said member their sick pay or funeral benefits shall be paid by the Supreme Circle through the Supreme Treasurer; said sick pay or funeral benefits shall be the same in amounts as provided for in the by-laws of the suspended or defunct Circle of which the Companion was a member thereof."

The provisions of Section 11 of Article XI do not apply where all the members of a circle withdraw leaving no minority to be protected.

There is no provision of the constitution or by-laws of the Supreme or Grand Circles governing subordinate Circles, which forbids the latter from withdrawing or seceding as a whole from the association. Under these circumstances all the members of Circle 134 could rightfully secede or withdraw from the association without giving a reason therefor, and without subjecting the property of such subordinate Circle to forfeiture, and could continue as the master finds "as an association for similar purposes but unaffiliated with any State or national organization."

In view of the conclusion reached it is not necessary to decide whether, even if Circle 134 had disbanded, its property would have been forfeited or subject to the provisions of Section 13 of Article 15 of the Supreme Circle laws. As to which see *Austin v. Searing*, 16 N. Y. 112; *Wells v. Monihan*, 129 N. Y. 161; *Wicks v. Monihan*, 130 N. Y. 232; *S. C. 14 L. R. A. 243*; *Bacon, Ben. Soc. & Life Ins.* § 116, cl. 4.

It follows that the interlocutory and final decrees must be affirmed.

*So ordered.*

The case was submitted on briefs.

*H. L. Brown, E. Field & W. F. Murray*, for the plaintiff.

*J. J. Shaughnessy & J. M. Maloney*, for the defendants.

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ARTHUR M. CARD vs. TURNER CENTRE DAIRYING ASSOCIATION.

Essex. May 15, 1916. — June 21, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

*Negligence, Employer's liability, In operation of automobile. Evidence, Failure to call witness. Witness.*

Where, at the trial of an action by an employee against his employer for personal injuries, received when the plaintiff was cranking an automobile truck of the defendant and caused by the engine "kicking back," the evidence most favorable to the plaintiff tended to show that the truck had been purchased by the defendant not more than five months before the plaintiff's injury and that it was new when purchased, that there had been no wearing of the engine or injury to it, but that occasionally it "skipped," and experts testifying for the



plaintiff stated that skipping might indicate either a short circuit, the stripping of a gear, or a lost pin, and that it might happen when there was "no kick back and no danger whatever," it was *held* that there was no evidence that the "kicking back" was in any way due to negligence for which the defendant was responsible.

At the trial of an action by an employee against his employer for personal injuries alleged to have been caused by a defect in an automobile truck of the defendant, no inference unfavorable to the defendant can be drawn from the fact that he failed to call as witnesses the employees of a garage where the truck was kept, such employees being equally available to the plaintiff.

TORT for personal injuries received on November 13, 1912, when the plaintiff was operating an automobile truck in the scope of his employment by the defendant. Writ dated January 11, 1913.

In the Superior Court the case was tried before *Hall, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant asked that a verdict be ordered in its favor, but, subject to the defendant's exception, the judge submitted the case to the jury, who found for the plaintiff in the sum of \$200. At the request of the defendant, the judge reported the case for determination by this court, judgment to be entered upon the verdict if the case properly was submitted to the jury; otherwise, judgment to be entered for the defendant.

The case was submitted on briefs.

*H. T. Lummus*, for the defendant.

*W. E. Sisk & R. L. Sisk*, for the plaintiff.

CARROLL, J. The plaintiff, while cranking a two-cylinder Buick motor truck belonging to the defendant, was injured by the engine "kicking back." At the time of the accident he was employed by the defendant, who was not a subscriber under the workmen's compensation act. The sole question is whether there is any evidence of the defendant's negligence.

The plaintiff advanced the gas lever approximately one third of the quarter circle through which it turned, and moved forward about the same distance, the spark lever. He then attempted to crank the engine; it kicked back, and the crank handle struck him, causing the injury. Immediately, without changing the levers, he again turned the crank, and the engine started.

The evidence shows that a "kicking back" is the result of an explosion coming before the piston has reached the head of the cylinder. If the spark lever is advanced on the dial, it changes

the position of the contact points, so that the cam drives them apart before the piston has gone over the centre. On the other hand, when the spark lever is retarded, the spark comes after the piston has passed the centre. Before cranking a car it is important to have the spark lever in a retarded position. With a new car, this lever should be pushed back as far as it can go. If the car is worn so there is lost motion, the spark should be advanced in order to correspond with this loss.

The truck was new when purchased by the defendant in July, 1912. The plaintiff was injured in November of the same year. There was no evidence indicating any lost motion which required the advance of the spark lever, or, if there were such a condition, that it would be due to the defendant's negligence.

While one of the wheels was broken and the wind shield damaged, in the summer of 1912, no part of the engine or steering apparatus was injured.

The only evidence tending to show a defect or want of repair came from the plaintiff, who said he had noticed many times before he was hurt that the engine would "skip." Assuming this to be so, it does not show that the "skipping" was in any way connected with the backward motion of the engine. The plaintiff's experts testified that the "skipping" of an engine might indicate a short circuit, the stripping of a gear, or a lost pin; and it might happen when there was "no kick back and no danger whatever." It did not directly appear what caused the "skipping," nor that any conditions existed which were likely to cause it.

It further appeared that the more force used in cranking, the greater the momentum given to the fly-wheel, thus causing the piston to go over the centre.

Considering the entire evidence, we do not discover anything indicating a defect or want of repair which caused the crank handle to hit the plaintiff. If the engine was in proper condition, advancing the spark lever would cause the backward motion; and if the machine was worn by use, a proper adjustment of the levers would compensate for the loss of motion. Under these circumstances we do not see how it, successfully, can be contended that the defendant was negligent.

No inference unfavorable to the defendant could be drawn because it failed to call the employees at the garage where the

truck was kept. These witnesses were equally available to the plaintiff. *Fletcher v. Willis*, 180 Mass. 243. Wigmore on Evidence, § 288.

According to the terms of the report, judgment is to be entered for the defendant.

*So ordered.*

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LOUIS E. FLYE, administrator, *vs.* MARY F. HALL.

Suffolk. May 15, 1916. — June 21, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Pleading, Civil*, Declaration, Bill of particulars. *Conversion. Contract*, Implied. *Evidence*, Relevancy and materiality, Remoteness, Admissions, Testimony of witness in another proceeding. *Witness*.

There is no objection to the combination, in a declaration in an action of tort or contract, of a count for the conversion of money with a count for money had and received and a count upon an account annexed, all being for the same cause of action.

Such an action may be maintained although the plaintiff, upon the same facts, might have relief in a suit in equity for the termination of a trust and an accounting.

Where all the particulars necessary to a clear understanding of a cause of action are set forth in a declaration, they need not be repeated in a bill of particulars.

It is not necessary to use in a declaration the same detail of description of a cause of action that is called for in the presentation of evidence.

Where, at the trial of an action by the administrator of the estate of a mother against her daughter for money had and received, the plaintiff contended that the mother gave to the daughter sums of money at various times to be used for the mother's support and that the daughter was retaining a portion of such money that had not been expended, and financial dealings between the parties from July, 1900, to May, 1912, were in evidence and the defendant contended and introduced evidence tending to show that there was an accounting between the parties in October, 1905, and that a different arrangement was made beginning on January 1, 1906, the defendant properly was required in the discretion of the trial judge to answer the question, "What were your receipts in 1905?"

At the same trial an unsigned statement of the account between the parties which, according to some of the evidence, was handed by the defendant to the plaintiff, was admissible in evidence as an admission by the defendant, although she denied having given it to the plaintiff.

Also, testimony of the defendant as a witness in a proceeding in the Probate Court, which tended to contradict her testimony at the current trial, was admissible in evidence.

RUGG, C. J. This is an action of tort or contract. The declaration as amended contains three counts, one for the conversion of money, the second for money had and received, and the third on an account annexed, all being for the same cause of action. The first and second counts in substance aver that the plaintiff's intestate during her life handed to the defendant various sums of money to be used for the support of the plaintiff's intestate, the defendant's mother, and that a part only had been used for that purpose.

The defendant demurred to the declaration on various grounds. In support of the demurrer an elaborate and extended argument has been presented. It might have required detailed discussion in days when greater strictness of civil pleading was required. Now it is enough if the substantive facts necessary to constitute a cause of action are stated concisely and with substantial certainty. R. L. c. 173, § 6.

There is no objection to the combination in one declaration of a count for conversion with one for money had and received and another on an account annexed for the same transaction. *Devlin v. Houghton*, 202 Mass. 75. *Brown v. Sallinger*, 214 Mass. 245, 248. It is not fatal to the maintenance of this form of action that a suit in equity might have been maintained for the termination of a trust and an accounting. *Spear v. Coggan*, 223 Mass. 156. The same facts may be the basis for an action for money had and received. *Farrelly v. Ladd*, 10 Allen, 127. The particulars of the amounts of money placed in the defendant's hands having been set forth in the body of the count, need not have been repeated by items in a bill of particulars.

Details which might be necessary in evidence, such as the date of the intestate's death, the circumstances of the deposit of the money with the defendant, and the precise terms of the arrangement between her and the intestate, need not be pleaded.

The bill of exceptions states that the financial dealings between the defendant and the intestate between July, 1900, and May, 1912, were the subject of evidence by both parties apparently without objection. The defendant offered evidence tending to prove that there was an accounting in October, 1905, and that a different arrangement was made beginning January 1, 1906. Thereupon the defendant was required, subject to her exception,

to answer the question, "What were your receipts in 1905?" There is nothing in the record to show that this was not permissible within the discretion of the judge. The declaration charged payments made to the defendant beginning with 1902. Her sources of income during the period under inquiry well may have been pertinent. Manifestly this could not be said as matter of law to be going beyond a reasonable time. It was a question of fact whether the accounting was had in 1905.

The unsigned statement of the account which, according to some evidence, was handed by the defendant to the plaintiff was admissible against her even though she denied having given it to the plaintiff. It was in the nature of an admission.

A record of the examination of the defendant in the Probate Court in another proceeding, where the subject matter of this action was inquired into, rightly was admitted in evidence as tending to contradict the defendant's testimony. The record of her former testimony plainly was admissible either as containing admissions or as tending to shake the value of her present testimony by proof of inconsistent statements made elsewhere. Being properly in evidence, the statements were subject to legitimate comment in argument. No special objection was made at the trial to parts of the examination which now are argued to have been incompetent.

*Exceptions overruled.*

The case was submitted on briefs.

*H. B. Mackintosh & A. L. Braley*, for the defendant.

*F. M. Carroll & L. E. Flye*, for the plaintiff.

JOHN C. F. PHINNEY & another vs. LEE M. FRIEDMAN &  
another, assignees.

Essex. March 14, 1916. — June 22, 1916.

Present: RUGG, C. J., LORING, BRALEY, DECOURCY, & CROSBY, JJ.

*Sale, Avoidance by vendor by reason of fraud. Fraud. Replevin. Practice, Civil, New trial.*

An action of replevin cannot be maintained by a seller of goods against the assignee for the benefit of creditors of the buyer, a corporation, to compel the return of the goods on the ground that the buyer purchased them with the actual but undisclosed intention not to pay for them, where it appears that up to the day after the sale the treasurer of the buyer had had a controlling interest in the company, that, being of ample means, he had indorsed its paper and that by reason of that fact it had met promptly all its maturing merchandise debts, although, without the financial backing given by the treasurer, its business could not have been conducted successfully and the seller did not know and was not informed of that fact.

Mere silence or failure by a buyer of goods to inform their seller of facts relating to the buyer's financial responsibility, which for his own protection the seller ought to know, does not constitute fraud which will enable the seller to avoid the sale and maintain an action of replevin to compel a return of the goods.

Evidence, tending to show that, at the time when a corporation purchased certain goods, it was insolvent, that its treasurer, who owned a controlling interest in its capital stock, who was of ample means, and who by indorsing its commercial paper had enabled the corporation to continue in business which it could not have done without his backing, thirty days before the sale sold his entire interest in the corporation to the president and retired from any active participation in the business, and that ten days after the sale the corporation made an assignment for the benefit of its creditors, will warrant findings that at the time of the sale the officers of the corporation had no present expectation that the former treasurer would continue to give the corporation his financial backing and therefore that they could have no reasonable expectation of ever making payment for the goods; and, on such findings, the seller of the goods may maintain an action of replevin for their return.

Where, at the trial of an action of replevin by a seller against an assignee for the benefit of creditors of the buyer for the return of the goods on the ground that at the time of the sale the buyer had an actual but undisclosed intention not to pay for the goods, the judge orders a verdict for the defendant and, on exceptions by the plaintiff, it appears that the goods were sold in two parcels at dates a month apart, and that the evidence would not warrant a finding for the plaintiff as to the first sale but would warrant such a finding as to the second, the verdict as to the first sale should stand, but a new trial may be had, confined to the question of recovery of the goods included in the second sale.

BRALEY, J. The defendants, as assignees under an assignment at common law for the benefit of creditors of the R. & G. Shoe Company, to which reference subsequently will be made as the company, received as part of its assets two cases of cut leather soles bought of the plaintiffs by the company in two shipments, one on February 28 and the other on March 31, 1913. And upon being informed of the assignment, which was dated April 9, 1913, the sellers demanded a return of the goods because, as they alleged, the sales having been induced by the fraud of the company, no title passed. The defendants having refused compliance with the demand, the plaintiffs brought this action of replevin. The trial judge \* ordered a verdict for the defendants and the case is here on the plaintiffs' exceptions.

It is not asserted that the sales were induced by reason of any misrepresentations of the buyer, and the question for decision is whether there was any evidence which would have warranted the jury in finding that the company bought with the actual but undisclosed intention not to pay for the goods. The burden of proof rested on the plaintiffs, and the evidence concerning the financial condition of the company and its ability to meet its obligations in due course consists of statements made by one Gregory, its president, to the plaintiff firm but not in connection with the sales, and as a witness called by them at the trial. It appears from his testimony that before March 1, 1913, the treasurer held a controlling interest in the capital stock of the company, and, being of ample resources, indorsed its commercial paper, and the jury could find that without his financial support the business could not be successfully continued. Of this dependence of the company on the indorsements of its treasurer the plaintiffs were ignorant, as well as of its assets and outstanding liabilities which included an indebtedness direct and contingent to the treasurer of \$55,000 on a capitalization of \$75,000. It was under these conditions that on March 1, 1913, the treasurer sold his stock to the president, taking his promissory note in payment. And when, on April 4, 1913, the treasurer declined to indorse the company's promissory notes in the future, it seems certain from the tenor of all of the evidence, and as the president testified, "that the indorsement not being there for carrying its

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\* *Hall, J.*

business on, we were pushed by creditors" and the company was forced to make the assignment.

It being undisputed that before the sale of February 28, 1913, maturing merchandise debts had been met promptly, and that the company was steadily financed by the treasurer, there is no sound reason for saying, nor could the jury properly find, that debts for manufacturing supplies had been contracted with no reasonable expectation of paying therefor, and the plaintiffs cannot avoid this transaction.

The sale of March 31, 1913, occurred ten days before the assignment, and the jury could say that the company at the date of purchase if called upon to meet all of its obligations was insolvent, unless the treasurer made further advancements, and that this condition was known to the president. The fact of insolvency, however, would not warrant a finding that when the goods were ordered a fraudulent purpose was entertained not to pay for them. *Ayers v. Farwell*, 196 Mass. 349, 352. It is settled that mere silence or failure by the buyer to inform the seller of facts which for his own protection in the transaction he ought to know, does not of itself constitute fraud. *Brown v. Leach*, 107 Mass. 364, 368, and cases cited. And where a purchaser who is insolvent buys merchandise without disclosing his financial condition to the seller, who is ignorant of it but makes no inquiry and is not misled by any misrepresentations, there is no fraud in law which will avoid the contract, "if the purchase is made with a hope to be able to pay and with an intention to pay if possible." *Watson v. Silsby*, 166 Mass. 57. *Dow v. Sanborn*, 3 Allen, 181. Or in other words there must be a fixed intention and fraudulent purpose not to pay on the part of the purchaser when the goods are obtained.

The question of fraud being one of fact, the plaintiffs were obliged to introduce some evidence from which it positively could be found. *Barron v. International Trust Co.* 184 Mass. 440. And upon the record they are compelled to rely on the evidence of the president, their own witness, and the company's financial condition when the goods were ordered. The jury could disregard his testimony in so far as it tended to support his statement that the purchase was made honestly and in due course of business. It could be found the president knew at the time of purchase that



the treasurer had sold his stock and retired from any active participation in the business, and the jury could say that under these circumstances there was no present expectation that he would continue to finance its affairs and that the president had cause to believe that his financial support had been permanently withdrawn. A further finding would be warranted that these conditions indicated that there could have been no reasonable expectation of ever making payment. *Watson v. Silsby*, 166 Mass. 57, 60.

While the exceptions must be sustained, the new trial is to be confined to this purchase only; and the verdict for the defendants on the first purchase is to stand. St. 1913, c. 716, § 1.

*So ordered.*

*H. A. Bowen*, (*A. Goldberg* with him,) for the plaintiffs.

*Lee M. Friedman*, for the defendants.

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FREDERICK W. DALLINGER, administrator with the will annexed,  
vs. MARY C. MERRILL, executrix, & others.

Suffolk. March 24, 1916. — June 22, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Devise and Legacy. Executor and Administrator. Equity Jurisdiction, Bill for instructions. Equity Pleading and Practice, Decree.*

A testator, whose will was in his own handwriting and apparently was drawn by him without consultation with counsel, provided in that will as to the residue of his estate, first, that his wife "during her life" should have the income of the residue with a power to use the principal for "the best interest of my children at her discretion" and upon her death "the residue to be divided equally among my children," that, if either of his children should have died without receiving his or her share of his estate and should have left a child or children surviving, the share of such deceased child should go to his or her issue, but that if any of his children should have died before receiving his or her share and should have left no child surviving, the share of such deceased child should go to his or her brothers and sisters and their issue, if any, according to the right of representation. The testator then provided as follows: "And my will further is that if at any time after one year from the time of my decease, no child of mine shall be surviving my said executrix shall use all the said estate for her sole and separate

use and benefit in all respects as she shall think best (both principal and interest) and may dispose of the same by will, but in case she should die after the death of all my children and shall not have disposed of all my said estate by will or otherwise that the residue thereof shall be divided equally among my sisters, A and M, (or be given to the survivor of them in case either of them shall die without leaving children) for their sole and separate use and benefit and that of their children." The testator was survived by his wife, who waived the provisions for her in the will and claimed her statutory share of his estate. He also was survived by an only child, a son, who died testate and childless, leaving all his property to his widow. The widow of the first named testator was living. *Held*, that by the clause quoted above the testator in enlarging the power of his wife over the residue of his estate after the death of all his children, did not make an absolute gift to her of the whole property, but on the contrary made a valid gift over to his sisters.

And, therefore, the widow having waived the provisions for her in the will, upon the death of the son during the widow's lifetime the sisters took an absolute estate in the residue subject to the statutory rights of the widow.

Where on a bill by an administrator for instructions the plaintiff is ordered to pay a share of the residue of an estate to the legal representative of a deceased residuary legatee, and where there is no dispute as to such share nor as to the persons entitled to receive it, it may be ordered in the alternative that the payment of such share may be made directly to the children of such deceased legatee without the appointment of an administrator to receive and distribute it.

LORING, J. Under the will of his mother, James C. Merrill was entitled to a fund upon the death of his sister, the life tenant. Upon the death of the sister in 1912, the fund in question was paid to the plaintiff as the administrator with the will annexed of James C. Merrill's estate. The question presented by this bill for instructions arises under the third and fourth clauses of his will,\* made in 1852. At that time the testator was a comparatively

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\* The case was reserved by *Loring, J.*, for determination by the full court. The third and fourth clauses of the will were as follows: "In the second place, I give, devise and bequeath to my said executrix, all the property real, personal or mixed of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, (except what may be necessary for the payment of my just debts and funeral expenses as above provided for) to have and to hold the same to her sole and separate use and benefit, or for the best interest of my children at her discretion, during her life, and after her death the residue to be divided equally among my children for their sole and separate use and benefit; and in case either of my children shall have died before receiving his or her share of my said estate and shall have left a child or children surviving that portion of such deceased child shall be divided equally among his or her surviving children according to the right of representation; but if such deceased child shall have left no child sur-

young man with a wife and one child. By the third clause he gave to his wife a life estate in the residue with a power of using the principal "for the best interest of my children at her discretion" and upon her death "the residue to be divided equally among my children." He then provided that, if either one of his children should die "before receiving his or her share of my said estate" and should have left a child or children surviving, the portion of the deceased child should be divided equally among his or her children, and, if such deceased child should not leave issue surviving, the portion of the deceased child should be equally divided among his or her surviving brothers and sisters or their children by right of representation.

Then comes the fourth clause. That clause provides: "And my will further is that if at any time after one year from the time of my decease, no child of mine shall be surviving my said executrix shall use all the said estate for her sole and separate use and benefit in all respects as she shall think best (both principal and interest) and may dispose of the same by will, but in case she should die after the death of all my children and shall not have disposed of all my said estate by will or otherwise" the residue shall be divided equally between his sisters, naming them, with some qualifying words.

The provision as to waiting for one year after the decease of the testator was manifestly inserted to cover the period of gestation. This clause begins as if it were an independent clause, making a new disposition of the residue without regard to the disposition of it made in the third clause. But if the clause is

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viving that the portion of such deceased child shall be divided equally among his or her surviving brothers and sisters, or their children according to the right of representation.

"And my will further is that if at any time after one year from the time of my decease, no child of mine shall be surviving my said executrix shall use all the said estate for her sole and separate use and benefit in all respects as she shall think best (both principal and interest) and may dispose of the same by will, but in case she should die after the death of all my children and shall not have disposed of all my said estate by will or otherwise that the residue thereof shall be divided equally among my sisters, Anna S. Merrill and Matilda E. Merrill, (or be given to the survivor of them in case either of them shall die without leaving children) for their sole and separate use and benefit and that of their children."

taken to be such a disposition of the property the result would be (in the event which has taken place) that there are two inconsistent dispositions of the residue subject to the life estate of the testator's widow.

The events which have taken place are these: The testator died in 1869. His estate (both real and personal) was exhausted in paying his debts.\* His widow renounced the provisions made for her in her husband's will. She is now living, an insane person under guardianship. The testator's child who was living in 1852 (when the will here in question was made) was the only child the testator had. He was a son. He died testate in 1902, leaving a widow who was appointed executrix of his will and was the sole legatee thereunder. The right of the widow of the testator to have her statutory interest in this fund is not disputed. The contest in this case is between the widow of the son and the sisters of the testator who claim under the gift over to them under the fourth clause of his will.

The fact that the fourth clause, if construed as an independent gift, results in there being two inconsistent gifts of the residue after the life estate of the testator's widow shows that the fourth clause cannot be so construed. Construed in connection with the third clause the testator's intention seems to be pretty plain. Moreover these two clauses are to be construed in the light of the fact that the will is in the testator's own handwriting and apparently was made by him without consultation with counsel. Putting ourselves in the testator's place when this will was made by him, and under the circumstances which existed at the time it was executed, What was his intention? It is plain that the testator first said: I wish my wife "during her life" to have the income of the residue of my estate with a power to use the principal for "the best interest of my children at her discretion;" after her death I wish "the residue to be divided equally among my children." But if either of my children shall have died before receiving his or her share of my estate and shall have left a child or children

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\* The fund which was the subject of the controversy consisted of about \$13,000 of personal property which came to the administrator *de bonis non* with the will annexed of the estate of James C. Merrill, long after the death of his testator, under a trust created by the will of Anna S. Merrill, the mother of James C. Merrill.

him surviving, the share of such deceased child shall go to his issue. But if either of my children shall have died before receiving his or her share of my estate and shall have left no child surviving, the share of such deceased child shall go to his brothers and sisters and their issue, if any, according to the right of representation. The testator then pauses and says to himself: I have now disposed of the residue of my estate by giving it to my wife for life with a power of using it "for the best interest of my children at her discretion," if I have a child living at the date of the death of my wife, the gift over in favor of my children takes effect. But suppose all my children die without having received their share of my estate, what then? Having that contingency in mind he writes: "And my will further is that if at any time after one year from the time of my decease, no child of mine shall be surviving" my wife shall have a larger power of disposing of the estate than I gave to her in case there were children of mine living. In that case she shall have full power of using up, that is, consuming, the property during her life and also full power of disposing of it by will. But, if she does not do so, whatever is left shall go to my sisters.

It seems pretty plain that the fourth clause was intended by the testator to be thus read in connection with the third clause. But even if this clause is not to be read in detail in that way, the mere fact that the fourth clause construed as an independent gift results in a conflicting disposition of the residue after the death of the testator's widow, is of itself enough to show that the fourth clause must be construed in connection with the third clause and the same result is reached.

The correctness of this result has not been seriously questioned by the widow of the testator's son. Her contention is that the gift made to the widow of the testator in the fourth clause is an absolute gift of the residue of the testator's estate, and if that be so, the gift over of the residue to the sisters of the testator is void under the doctrine of *Ide v. Ide*, 5 Mass. 500, affirmed in *Galligan v. McDonald*, 200 Mass. 299. For a later case, see *Sherburne v. Littell*, 220 Mass. 385, 388.

Therefore the question which we have to decide comes down to the question of the construction of the gift to the widow of the testator contained in the fourth clause.

Where a will contains a gift of the use and improvement of the estate of the testator and does not contain any other disposition of his property, there is an absolute bequest of personal property to the legatee named and a devise in fee if the property is real estate. *Chase v. Chase*, 132 Mass. 473. *Hayward v. Rowe*, 190 Mass. 1. So far as the terms used in the fourth clause are concerned there would have been an absolute gift of the personal property to the testator's widow, within the rule stated above, if the provision of that clause had been the only provision contained in the will disposing of the testator's personalty. But the provisions of the fourth clause in favor of the testator's widow are not the only provisions of the will disposing of his property. In the third clause there had been in terms a bequest to the widow "during her life" with limited power of disposition of the principal. The provisions in favor of the testator's widow contained in the fourth clause must be construed in connection with that provision of the third clause. So construed they gave to the testator's widow a more ample power of disposing of the principal both during her life and by her will and this is followed by a gift over of the principal not disposed of by her in the exercise of the powers thus given her.

The argument of the learned counsel for the son's widow (the executrix of his will and the sole legatee under it) is that the rule of *Ide v. Ide* is law. Of that there is no doubt. But that is not the question which we have to decide. The question which we have to decide is whether the gift to the testator's widow comes within that rule. The rule of *Ide v. Ide* is that where the first gift is a gift of the whole property (that is, an absolute bequest of personalty or a devise in fee of real estate) the gift over is bad. The question we have to decide is whether the gift to the testator's widow contained in the fourth clause is such a gift. We are of opinion that it is not. We have examined all the cases relied on by him.\* Without stating in detail the terms of the first gift in those cases, there is not one of them which helps this defendant

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\* The cases here referred to are: *Burbank v. Whitney*, 24 Pick. 146; *Tracy v. Kilborn*, 3 Cush. 557; *Damrell v. Hartt*, 137 Mass. 218; *Sherburne v. Sischo*, 143 Mass. 439; *Joslin v. Rhoades*, 150 Mass. 301; *Foster v. Smith*, 156 Mass. 379; *Hunting v. Damon*, 160 Mass. 441; *Knight v. Knight*, 162 Mass. 460; *Kelley v. Meins*, 135 Mass. 231; *Galligan v. McDonald*, 200

in her contention that the gift made to the widow of the testator in the fourth clause was an absolute gift of the personal property. The gift comes within the following cases: *Chase v. Ladd*, 153 Mass. 126; *Kent v. Morrison*, 153 Mass. 137; *Baker v. Thompson*, 162 Mass. 40; *Collins v. Wickwire*, 162 Mass. 143; *Lewis v. Shattuck*, 173 Mass. 486; *Dana v. Dana*, 185 Mass. 156; *Hayward v. Rowe*, 190 Mass. 1; *Ware v. Minot*, 202 Mass. 512. The gift made to the testator's widow in the fourth clause could not be held to be an absolute gift without overruling most if not all of these cases.

The widow of the son has in effect made the further contention that a gift of a life estate, with an absolute power to the life tenant of disposing of the principal during her life and at her death by will, amounts to a fee, and for that reason this case comes within the doctrine of *Ide v. Ide*, *ubi supra*. But that is not so. It is within the power of a testator to give property to another for life with full power of disposing of the principal during his life and by will at his death, and yet what is given is a life estate coupled with a power and not an absolute gift of personal property, or a devise in fee of real estate. *Dana v. Dana*, 185 Mass. 156. This is not the only instance in the law where a conveyance or devise is valid if properly drawn, while a conveyance or devise improperly drawn which accomplishes the same practical result is void. For example, it is settled that a conveyance or a bequest by a husband to his wife so long as she shall continue to be his widow with a gift over in case she marries again is valid, while a conveyance or devise by a husband to his wife upon condition that she does not marry again with a conveyance over if she does marry again is void.

The result is that, subject to the right of the widow of the testator to her statutory rights, the residue is to be paid over by the plaintiff, one half to the executrix of the will of Matilda E. Adams (the sister called in the fourth clause Matilda E. Merrill) and the other half to the administrator of the estate of Anna S. Ward (the sister of the testator called in the fourth clause Anna S. Merrill) or, there being no contention on the point, this half may

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Mass. 299; *Sherburne v. Littel*, 220 Mass. 385, at page 388; *Bassett v. Nickerson*, 184 Mass. 169.

be paid directly to her children, the terms of the decree to be settled by a single justice.

*So ordered.*

*T. W. Cunningham*, for the guardian of the widow of the testator.

*A. D. Hill*, (*P. E. Costello* with him,) for the children of Anna S. Ward, a sister of the testator.

*W. D. Turner*, for the widow of the son of the testator.



MARY E. GILLIS, administratrix, *vs.* NEW YORK, NEW HAVEN,  
AND HARTFORD RAILROAD COMPANY.

Suffolk. March 24, 1916. — June 23, 1916.

Present: RUGG, C. J., LORING, BRALEY, DECOURCY, & PIERCE, JJ.

*Negligence*, Railroad, In a freight yard. *Railroad. Evidence*, Relevancy. *Witness*, Cross-examination.

In an action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's employ, evidence that, after the deceased had had a conversation with the defendant's yardmaster at the freight yard where the accident occurred, the deceased returned to his train and said to the engineer that, after dropping certain freight cars, he was going to return with the engine on a certain track, which turned out not to be clear and on which the accident happened, is not evidence that the yardmaster told the deceased to return on that track.

In the same case it was *held*, that the yardmaster, having had no reason to suppose that the deceased would try to return on the occupied track, was under no duty to warn him not to do so.

In the same case it was *held* that under the circumstances disclosed by the evidence it was the duty of the deceased, after having delivered the cars that he had brought to the freight yard, to go to the yardmaster to ascertain what track he was to use in going out.

In the same case the plaintiff contended that under the rules of the railroad corporation the engineer was responsible equally with the deceased conductor for the proper handling of the train and relied on a rule of the defendant in regard to engineers which contained the provision, "Should there be any doubt as to the right of road, or safety of proceeding, from any cause, consult with the conductor and be equally responsible with him for the safety and proper handling of the train." But other rules of the defendant provided as follows: "Engine Men. On the road, obey orders of the conductor as to starting, stopping, shifting cars; as to general management of the train, unless such orders endanger the safety of the train or would require a violation of the rules or cause injury to persons or to property," and "Conductors. Be responsible for all switching move-



ments." *Held*, that the rule first quoted in regard to the responsibility of engineers must be construed in connection with the other rules quoted.

In the same case it was *held* that under the rules described above it was the duty of the engineer, unless he knew that the course adopted by the conductor would bring about a condition of danger, to follow the conductor's orders.

In the same case the plaintiff contended that the head brakeman was negligent because after climbing through the cars on the occupied track he sat down on the next track, which was clear, waiting for the deceased conductor to come back with the engine on the clear track, instead of warning him not to return on the occupied track, and it was *held*, that, assuming that it would have been the duty of the head brakeman to have done what he could to prevent the accident if he had had any reason to foresee it; yet he had no reason to suppose that the deceased conductor would undertake to return with the engine on the occupied track.

In the same case the plaintiff contended that the fireman was negligent because in going into the freight yard on the parallel track he ought to have seen from his side of the cab of the engine that there were cars on the occupied track by which the deceased conductor attempted to return, but it was *held* that it was no part of the duty of the fireman to examine the tracks in order to warn the conductor, who was in charge of the train subject to the orders of the yardmaster, as to which track he ought to take on coming back.

It is not justifiable to found an inference nor an argument upon a palpable verbal slip made by a witness in one of his answers upon his cross-examination.

In the case described above it was *said* that the deceased, although an experienced and careful conductor, neglected his duty four times before the accident that caused his death: first, in not reporting to the yardmaster with his way bills when he delivered the freight cars he had brought, second, in undertaking to use a track in going back with his engine without permission from the yardmaster to do so, third, in failing to examine the track before thus using it without permission to find out whether it was clear, fourth, in having no light on the tender of the engine when backing down and in supplying this lack by standing with his conductor's lantern at the rear end of the tender where he was killed by coming in collision with cars standing on the track; and it was *held* that on the evidence he was the only person who could have been found to be negligent and that the case came within the decision in *Great Northern Railway v. Wiles*, 240 U. S. 444.

LORING, J. This is an action under the federal employers' liability act \* brought to recover for the death of a freight con-

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\* 35 U. S. Sts. at Large, c. 149, as amended by U. S. St. 1910, c. 143. The parts of that statute here material are as follows: § 1. "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, . . ." § 3. "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages

ductor in the defendant's employ. The accident happened in the Readville transfer yard. The administrator called to the witness stand the yardmaster of that yard, and the engineer, fireman and head brakeman of the train. He also put upon the stand a Hyde Park policeman whose testimony has no bearing on the case. Upon the conclusion of the plaintiff's evidence, the presiding judge \* ruled that the plaintiff was not entitled to recover and directed the jury to find a verdict for the defendant and reported the case for determination by this court.

The facts disclosed by the plaintiff's evidence were as follows: The Readville transfer yard is a yard some four thousand feet in length used for the distribution of freight cars. The entrance to the yard at each end is controlled by an interlocking switch tower. The tower first reached by a train running east is tower 180, and that at the other end is tower 234. The yardmaster's office is situated some twenty-six hundred feet beyond tower 180 and about fourteen hundred feet short of tower 234. At that point there are eighteen tracks in the yard, seven (not including a short spur track) in front and eleven behind the yardmaster's office. The train in question was bound for the South Boston freight terminal of the defendant railroad, having started from Midway, a point in Connecticut on or reached by the Providence division. The Providence division is a two track road until this yard is reached. A freight train bound for the South Boston terminal leaves the east bound passenger track of the Providence division at tower 180 and runs on the main east bound freight transfer track No. 2 which skirts all the tracks behind the yardmaster's office and farther on connects with one of the tracks of the Midland division. The tracks of the Midland division cross the tracks of the Providence division on an overhead bridge at Readville beyond tower 234. From this it appears (and it was a fact) that a freight train coming from a point on the Providence division bound for South Boston freight terminal had to climb a hill between tower 180 and the connection between the main freight transfer track and the tracks of the Midland division.

for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, . . ."

\* *White, J.*

The train in question left Providence with thirty loaded freight cars bound for the South Boston freight terminal. Between Providence and tower 180 it had to take up fifteen more. These were bound for the Readville transfer yard to be distributed from there to various stations in the neighborhood.

Under these circumstances the deceased before leaving Providence went to the train dispatcher there and asked him (the train dispatcher) to give him (the deceased) permission on arriving at tower 180 to leave the thirty cars of his train bound for the South Boston freight terminal on the main passenger track while he left the other fifteen cars in the Readville yard. The reason why he did this was because the train of forty-five cars was too heavy a train to haul up "over the hill."

Under these conditions the deceased came to tower 180 at about quarter past ten o'clock at night. At that point he stopped his train; he went into the tower and called up the yardmaster by telephone and said to him: "'I have a heavy train, forty-five cars. I don't think my engine can haul them over the hill,' or 'haul them up track 2.' . . . 'I have obtained permission from the Providence Division Dispatcher to drop my train on the main line if you will allow me to pull into the yard.'" To which the yardmaster said: "'All right Al, I will line up one of the clear tracks in front of the office to pull down and drop your fifteen cars.'" Thereupon the yardmaster examined tracks 10, 8 and 6 which lay directly in front of his office. It was a Sunday night and on Sunday nights the yardmaster had no assistant. He found that tracks 10 and 6 were clear, but that there were some cars on track 8. Thereupon he set the switches for the deceased's train to take track 10. After setting the switch he waited there about two minutes and as the deceased came along with his train "I gave him the hand signal from some point right around 10 switch. . . . It is a 'come on' signal."

On leaving the tower the deceased boarded the engine and as they went forward he said to the engineer, "We will go in on 8 and come out on 10." When the engineer saw that the yardmaster had set the switches for the train to go in on 10, he said to the deceased, "The switches are lined up for track 10," to which the deceased answered, "It don't make any difference, we will go in through 10 and come back through 8."

The deceased stopped his train of fifteen cars so that the middle of it was about opposite the yardmaster's office. It was his duty then to go to the yardmaster and deliver to him the way bills for the fifteen cars which were to be distributed from the Readville yard. On the train stopping opposite his office, the yardmaster went to the rear of this train of fifteen cars, expecting to see the conductor there and to receive from him these way bills. On arriving there he did not find the conductor. Thereupon he returned to his office.

When the fifteen cars had been brought to a standstill, the conductor got down from the engine and cut them off. He then boarded the engine again and rode on it to the other end of track 10. When the engine reached this point he again got down and went to No. 8 switch and set that switch so that the engine could come back on track 8. While he was doing this, the engine went on to the "water plug," which was farther on toward tower 234, and he waited for the engine to come back. When the engine had taken water it came back to No. 8 switch and the deceased then boarded the engine. The engineer said to him, "there is no light on the rear end of that tender." By the rules of the road no engine can back down without a light on the tender. Thereupon the conductor boarded the rear end of the tender and stood there with his conductor's lantern while the engine backed down on track 8 until they came into collision with the cars upon that track which were some two hundred and fifty feet in from the switch. When the engine came into collision with these cars, the front ones (which were flat cars) rose up over the tender and struck the deceased. He was immediately carried to the Readville station, but died before he arrived there.

1. The first contention made by the plaintiff is founded upon the fact that the deceased told the engineer when they were on the engine after leaving tower 180 that they were to go in on track 8 and come out on track 10, and that when the engineer, seeing that the switch had been set for the train to go in on track 10, told the deceased that, he said, "It don't make any difference, we will go in through 10 and come back through 8." From the fact that the deceased made these statements to the engineer, the plaintiff contends that the jury were warranted in finding that in the course of the conversation which the deceased had with the yardmaster

over the telephone while the deceased was in tower 180 the yardmaster had told the deceased to go in on track 8 and come out on track 10. In support of this contention the plaintiff has relied upon the case of *Nagle v. Boston & Northern Street Railway*, 188 Mass. 38. But that decision does not support this contention. In *Nagle v. Boston & Northern Street Railway* what the deceased said was that the car starter had told him to take the track which he took. If the engineer had testified that what the deceased said to him was that the yardmaster had told him to go in on track 8 and come out on track 10, the case at bar would have come within the decision in *Nagle v. Boston & Northern Street Railway*. But in the case at bar the engineer did not testify that the deceased told him that the yardmaster directed him (the deceased) to go in on track 8 and come out on track 10. Of course the jury could disbelieve the testimony of the yardmaster although he was put on the witness stand by the plaintiff, if there was any evidence to contradict him. But there was none. The fact that the deceased said that he was going to take a certain course after he had the conversation with the yardmaster is not evidence that the yardmaster told him to take that course of action.

So far as the direct testimony goes, the yardmaster told him that he would "line up" a track for him without telling him what track he would "line up," intending to find out what tracks were clear and then "line up" one of them for the deceased.

2. The plaintiff's second contention is that the jury were warranted in finding that the yardmaster was negligent because he returned to his office to attend to his duties when he failed to find the conductor at the rear end of the fifteen cars. His contention is that when he found that the conductor was not at the end of the fifteen cars he ought to have gone out into the yard, found him and told him what track to come back on. But the jury were not warranted in making that finding. The yardmaster's duty was at his office. He was not only the yardmaster of this yard but of five others. He did not know what call would come to him next. It was his duty to be at his office or in that immediate neighborhood so as to respond to any call as to the conduct of the yards under his control. More than that he had no reason to suppose that the deceased would undertake to use any track in the yard without getting permission from him to do so. Under

the rules of the company the deceased had no right to use a track in the yard without permission from the yardmaster. And lastly, it was the duty of the conductor to bring the way bills (which showed where the fifteen cars to be left in the yard were to be sent to) to the yardmaster, and it was the duty of the yardmaster to remain at his office to receive them.

The difficulty with the plaintiff's argument is that in this instance, and throughout his whole argument, he asks the court to judge of the character of the action of the defendant's employees in the light of what transpired afterwards, and not in the light of the conditions which confronted the employees at the time they took the action which the plaintiff complains of. It goes as a matter of course that if the yardmaster had known what the deceased was going to do he ought to have taken means to stop it. But the yardmaster had no reason to suppose that the deceased would do what he did in fact do. It was his duty (as we have said before) to remain at his office to answer any calls which might come to him for the conduct of this and the other yards. There is nothing in the cases cited by the plaintiff in this connection, (*Grant v. Union Pacific Railway*, 45 Fed. Rep. 673, 680; *Evans v. Detroit G. H. & M. Railway*, 148 N. W. Rep. 490; *Texas & New Orleans Railway v. Tatman*, 10 Tex. Civ. App. 434, 435,) which helps him.

3. The answer to the next contention made by the plaintiff has already been given. That contention is that, when the yardmaster on going to the rear end of the fifteen cars did not find the deceased, the jury were warranted in finding that he ought to have telephoned to tower 234 and told the tower man to tell the deceased through the megaphone not to come back on track 8. The conclusive answer, as we have already intimated, is that the yardmaster had no reason to suppose that the deceased would undertake to come back on track 8. An additional answer (if one were necessary) was given by the yardmaster in his testimony, namely, that it is bad railroading to send orders through a third person, and not only that, but through a third person who has to speak through a megaphone to deliver the order to be transmitted by him.

4. The next contention made by the plaintiff is that the yardmaster ought to have warned the deceased that there were cars on track 8 when he first spoke to him over the telephone while

the deceased was in tower 180. But that would have been bad railroading, as the yardmaster testified. It was not proper for him to tell him to use a particular track until he found by actual inspection that the track was clear. That was the course pursued by the yardmaster. He gave permission to the deceased to come into the yard and told him that he would "line up" a track for him to use. Thereupon he left his office. He examined the tracks which were lying in front of it. He found that 10 and 6 were clear and 8 was blocked. Thereupon he set the switch for 10 and signalled the deceased to come in on 10. Under the course of action properly adopted by the yardmaster, it was the duty of the deceased to come to him to ascertain what track he was to use in going out.

5. The next contention of the plaintiff is that the engineer was equally culpable with the deceased conductor under the rules. The plaintiff's contention here is that the rules make the engineer equally responsible with the conductor for the safety and proper handling of the train. This contention is based upon rule 544. That rule provides: "Make the safety of the train of the first importance in the discharge of their duties. Should there be any doubt as to the right of road, or safety of proceeding, from any cause, consult with the conductor and be equally responsible with him for the safety and proper handling of the train, and for such use of signals and other precautions as the case may require." That rule must be read in connection with Rules 500 and 615. So far as material, Rules 500 and 615 are as follows: "Rule 500 . . . 'Engine Men. On the road, obey orders of the conductor as to starting, stopping, shifting cars; as to general management of the train, unless such orders endanger the safety of the train or would require a violation of the rules or cause injury to persons or to property.'" "Rule 615. 'Conductors. Be responsible for all switching movements.'"

6. The plaintiff's next contention is that the engineer was negligent because while he was backing down on track 8 he testified he was leaning out of his cab and looking at that track and he ought to have seen the cars. The engineer testified that he was watching in that direction, and it was his duty as much as the conductor's to see that his engine got out safely. When asked this question, "And although you were looking in that direction, and

had nothing else to do but look and run your engine, you did not make that observation to see whether the track was clear or not?" he answered, "I was looking to see if it was clear, certainly; I was watching the conductor." He then was asked this question: "And if a man looked properly in the direction in which you were looking, he ought to have seen obstructions, if they were there?" to which he answered, "Why yes; a man on the rear end of the tender had." This answer taken in connection with the rules of the railroad disposes of this contention. It was the duty of the engineer unless he knew that the action of the conductor brought about a condition of danger, to follow the conductor's orders. This engineer knew that he had been ordered by the conductor to back down on track 8. He knew that his conductor was standing on the rear tender. Under these circumstances there was no duty upon him to make certain that track 8 was clear and the jury were not warranted in finding that he was negligent because he did not see the cars upon track 8.

7. The next contention of the plaintiff is that the head brakeman was negligent. The head brakeman testified that after he had set the brakes on four or five of the fifteen cars which were left on track 10, he climbed through the cars on track 8 and sat down on track 6 expecting the engine to come back on that track. If the head brakeman had known that the deceased was going to undertake to come back on track 8, it may be assumed that it would have been his duty to have done what he could to prevent the accident. But he had no reason to suppose that the deceased would undertake to do that. Under these circumstances he had no duty to perform to prevent the accident, and the jury were not warranted in finding that he was negligent in sitting down on track 6 and waiting for the engine to come back.

8. The last contention of the plaintiff is that the fireman was negligent. This contention is based upon the fact that track 8 was on the fireman's side of the cab and the fireman ought to have seen that there were cars on track 8 when they went through on track 10, and it was negligent for him not to have seen them and to have told the engineer not to go back on track 8. Here again it was no part of the duty of the fireman to examine the tracks to warn the deceased as to which track he ought to take on coming back from track 10. The deceased was the conductor and was in charge of



the train subject to the orders of the yardmaster. The jury were not warranted in finding that the fireman was negligent because he did not undertake to superintend the proper execution by the conductor and the yardmaster of their respective duties.

9. The plaintiff has relied upon the fact that the yardmaster made a slip in his direct testimony, in that there is an unfinished sentence in his testimony on cross-examination and upon the fact that on the evidence the jury could find that the deceased was an experienced and careful conductor. In describing on his direct testimony what he did after he had the conversation with the deceased while the deceased was in tower 180, the yardmaster said "he climbed through the cars on 8 and did the same thing to 6; found 6, 8 and 10 were clear." The statement that track 8 was clear, following within nine words the statement that "he climbed through the cars on 8" was so plainly a slip that no inference against the testimony of the witness was justified. The unfinished sentence on cross-examination was this: the counsel for the defendant asked the witness, "That [referring to setting the switch for track 10] would tell the conductor who was approaching that everything was clear, would it not?" To this the yardmaster answered "The conductor could tell by looking at the switches, but as I told him — I don't know as I told him, but I made a hand signal, — the engineer knew everything was all right." From this the plaintiff argues that the jury were warranted in finding that the yardmaster had told the conductor that everything was clear, including in everything track 8. In our opinion the inference is not warranted.

The fact that the deceased was an experienced and careful conductor, taken in connection with the fact that on leaving the tower he said that he was going in on track 8 and coming out on track 10, would not warrant the inference that the yardmaster told him to do so.

10. Why the deceased, although an experienced and careful conductor, neglected his duty at the Readville transfer yard four times on the night in question is a matter of conjecture. That he did neglect his duty on that night in four particulars, is the fact. He neglected his duty in not reporting to the yardmaster with his way bills when he had brought his fifteen cars to a stop on track 10 in front of the yardmaster's office; in place of doing that

he rode down on the engine to the switch on the end of track 8. He neglected his duty in the second place in undertaking to use track 8 without permission from the yardmaster. In the third place, if he was undertaking to use track 8 without permission from the yardmaster at his own risk, at least he should have examined the track he intended to use without permission to make sure it was clear. And in the fourth place, as the engine was backing down on track 8 he was standing at the rear end of the tender to show a light for the tender, and he stood there until he was killed by coming in collision with the cars on track 8. It is a fact that he had left his thirty cars on the east bound passenger track of the Providence division with a New York fast express only thirty minutes behind him; it is also a fact that he had induced the officer at Midway to make up the train and send him off at three o'clock, when the regular leaving time of the train was forty minutes past four. From these two facts it seems to be likely that the deceased was in a hurry. Whether his hurry explains his neglect of duty and the accident, is a matter of conjecture.

On the evidence the only person who was negligent was the deceased and the judge was right in directing a verdict for the defendant. The case comes within *Great Northern Railway v. Wiles*, 240 U. S. 444. There is nothing in the cases cited by the plaintiff which requires special notice. The entry must be

*Judgment on the verdict.*

*James J. McCarthy, (D. M. Lyons with him,) for the plaintiff.*

*J. L. Hall, for the defendant.*

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MARIE L. DAVIS vs. ELBERT R. ALLEN.

Middlesex. April 10, 1916. — June 23, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

*Tax, Sale of land for the collection of. Attachment.*

A purchaser at a sale of land for the collection of taxes, who at the time of the sale has no interest in the land other than that derived at the tax sale, gets a new title in fee unincumbered by an attachment previously placed upon the

land in an action brought against the person who owned it at the time of the tax sale; and if such purchaser afterwards conveys that title to one who, after the tax sale, acting for himself and in good faith, had purchased all the right, title and interest of him who had owned the land at the time of the tax sale, such second purchaser also gets a title unincumbered by the attachment or by a sale under an execution and levy following it.

CARROLL, J. This is a writ of entry to recover a tract of land in Newton. The case was heard in the Land Court on an agreed statement of facts,\* judgment was ordered for the demandant and the tenant appealed.

On May 5, 1899, the land in question, owned by Thomas J. Scollans, was attached on mesne process as the property of Scollans by Henry B. Goodenough. On June 27, 1900, it was sold by the city tax collector of Newton, for taxes assessed thereon against Scollans for the year 1898, to Harlow H. Rogers. On July 17, 1900, Scollans transferred the property to Arthur W. Eaton by quitclaim deed with the usual covenants. On October 2, 1901, Rogers conveyed all his right, title and interest to Eaton, and on October 29, of the same year, Eaton conveyed by quitclaim deed to the demandant. On June 21, 1902, the property was sold to Goodenough, the attaching creditor, "by sheriff's deed by virtue of an execution and levy, and the said attachment." By mesne conveyance the tenant holds under this deed of the sheriff.

There is no suggestion of fraud or collusion in connection with any of the transactions mentioned in the agreed statement. The assessment and tax sale, as well as the levy and sale under the execution, were in all respects legal.

When Rogers purchased the premises at the tax sale, his title thereto was a new and unrestricted one. It was independent of all incumbrances and paramount to all existing interests. In *Weeks v. Grace*, 194 Mass. 296, at page 300, it was said by Braley, J., that a purchaser at a sale of land for unpaid taxes "gets a new unincumbered title in fee by force of the lien of the taxing power, which cuts under all incumbrances or qualifying estates." In *Perry v. Lancy*, 179 Mass. 183, it was stated that such a purchaser obtained not only a paramount and new title, "but a seisin at the moment of the conveyance." See also *Abbott v. Frost*, 185 Mass. 398; *Langley v. Chapin*, 134 Mass. 82.

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\* By Corbett, J.

Rogers having an estate in fee simple, although subject to the right of redemption, *Butler v. Stark*, 139 Mass. 19, (see *Roberts v. Welsh*, 192 Mass. 278,) could transfer it, and convey to the grantee the same right which he himself possessed. However valid and effective the attachment of Goodenough against Scollans and the estate owned by him, it did not cloud the title of Rogers, except that the attaching creditor had the right to redeem.

If the tax debtor, Scollans, who owned the land at the time of the assessment and sale for taxes, had purchased from Rogers in October, 1901, he would have thereby redeemed the premises. Such a transaction being equivalent to the payment of his own debt, the attachment, under such circumstances, would continue as a valid and subsisting incumbrance on the property. See *Hurley v. Hurley*, 148 Mass. 444.

Eaton, on the other hand, when he acquired the title from Rogers, was acting for himself and in good faith. He was under no obligation to pay the taxes. He had no interest whatever in the land, except the right bought from Scollans; he stood in no fiduciary relation to him; he was neither his representative nor his agent. The principle governing the rights of the parties, where one having an interest in an estate acquires a tax title, such as a tenant in common, *Hurley v. Hurley, supra*; a mortgagee, *Walsh v. Wilson*, 130 Mass. 124; a mortgagor, *Coughlin v. Gray*, 131 Mass. 56, 58; a life tenant, *Solis v. Williams*, 205 Mass. 350, has no application on the agreed facts to the case at bar. "To preclude any person from making and relying upon a purchase of lands at tax sale, there must be something in the circumstances of the case which imposes upon him a duty to the State to pay the tax, or something which renders it inequitable as between himself and the holder of the existing title, that he should make the purchase." Cooley, J., in *Blackwood v. Van Vleet*, 30 Mich. 118, 121. See also *Oswald v. Wolf*, 129 Ill. 200, and the dissenting opinion of Dixon, C. J., in *Smith v. Lewis*, 20 Wis. 350, 355.

Eaton, by the grant from Rogers, held the property free from the attachment. His title and interest were the same as that of Rogers. The demandant, therefore, who holds under him, is entitled to recover. See *Laton v. Balcom*, 64 N. H. 92; *Jinkiaway v. Ford*, L. R. A. 1915 E 343.

There is nothing in *Da Silva v. Turner*, 166 Mass. 407, and

*Davidson v. Stafford*, 210 Mass. 145, to conflict with what is here stated.

Since the attaching creditor could have purchased at the tax sale, and also had the right to redeem, but failed to exercise these rights, no injustice is done him. St. 1909, c. 490, Part II, §§ 59, 61. *Union Trust Co v. Reed*, 213 Mass. 199.

The decision of the Land Court, awarding judgment for the demandant, is affirmed.

*So ordered.*

The case was submitted on briefs.

*H. W. Davies*, for the tenant.

*G. K. Bartlett & B. B. Piper*, for the demandant.

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### JOHN McMANAMAN'S CASE.

Suffolk. December 1, 1915. — June 29, 1916.

Present: RUGG, C. J., LORING, DE COURCY, & CROSBY, JJ.

#### *Workmen's Compensation Act.*

Under the workmen's compensation act the Industrial Accident Board may be warranted in finding that a longshoreman, whose fingers were frozen while he was at work in his regular occupation of unloading a steamer at a pier when the thermometer stood at four degrees below zero, was exposed "to materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date" in question, and that the injury was one arising out of his employment within the meaning of St. 1911, c. 751, Part II, § 1.

LORING, J. This is an appeal under the workmen's compensation act by the insurer from a decree entered \* upon an award in favor of the employee. The ground of the appeal is that as matter of law the injury which was suffered by the petitioner was not an injury arising out of his employment.

The facts were these: The petitioner was employed as a longshoreman. While he was at work at Pier 46 Mystic Wharf, Charlestown, in January, 1914, both hands were more or less frozen. As a result he lost two phalanges of the little finger of

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\* By order of *Morton, J.*

one hand, all the little finger of the other hand and has been incapacitated from pursuing his trade because his hands have lost the power of gripping and holding.

On the day in question the thermometer fell to four degrees below zero. About five o'clock in the afternoon the petitioner felt pain in his hands "which began to feel numb" and told his partner \* about it. His partner answered that they would soon be through work. The petitioner and his partner finished work shortly after half past five o'clock. When the petitioner went for his pay he found that he was not able to put the money in his pocket because of the stiffness of his fingers and his partner did it for him; and when he undertook to take money from his pocket to pay his carfare on his way home, he could not open his hands and his partner paid his fare for him.

The petitioner's work consisted when the tide was high in catching the goods which were being unloaded as they were slid down a plank and then loading them on trucks. When the tide was low this gang plank was more or less horizontal and the goods were then unloaded by trucking them out over the gang plank. This was done by two men, one of them holding the handles of the truck and the other pushing from behind. It was the petitioner's duty to push from behind.

The finding of the Industrial Accident Board was in these words: "The evidence shows that the employee, John McManaman, was especially exposed, by reason of the performance of his work as a longshoreman, to materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date upon which he received the personal injury or frostbite." The reasons given by the board for this finding were that: "the conditions under which he was obliged to work rendered him peculiarly liable to danger of personal injury by frostbite; and the nature of his employment, that of aiding in unloading the vessel upon which he was engaged by means of pushing the truck upon which the merchandise was placed, especially exposed him to the danger which caused his incapacity for work, frostbite of the hands." By this we understand the board to have meant that: (1) The cold is greater on a pier protruding into the harbor

\* The other man who worked on the same truck, as explained in the next paragraph.

than that to which a person working in the open is ordinarily exposed; and (2) The petitioner was not at liberty to stop his work to prevent his hands or feet from being frozen as a person ordinarily would have been at liberty to do. It well might be found that a person hired to unload a steamer cannot stop work. And this is intensified by the fact that McManaman was working with a partner and that if he stopped work, the work of the partner would have to be stopped too.

The learned counsel for the insurer has argued that "It is significant that in all cases of frostbite passed upon by Appellate Courts the question has been answered negatively." For this he cites *Warner v. Couchman*, 4 B. W. C. C. 32; *Karemaker v. Owners of Steamship Corsican*, 4 B. W. C. C. 295; *Laspada v. Public Service Railway*, 38 N. J. L. J. 102. The last case cited was not the decision of an "Appellate Court." *Warner v. Couchman* went to the House of Lords, see [1912] A. C. 35.

But it is not true that in the other two cases (*Warner v. Couchman* and *Karemaker v. Owners of Steamship Corsican*) it was decided that an injury from frostbite was not an injury arising out of the employment of the employee in question in those cases. In both those cases the judge of the county court found as a fact on the evidence before him that the injury suffered by the employee was not an injury arising out of his employment. And in both cases the Appellate Court (in the first case the House of Lords and in the second case the Lords Justices of Appeal) decided that on the evidence before him the judge of the county court was justified in making that finding of fact. With three exceptions the same is true of all the other cases\* cited by the learned counsel for the insurer. The three exceptions are *Robson, Eckford & Co. Ltd. v. Blakey*, 49 Sc. L. R. 254, *Amys v. Barton*, [1912] 1 K. B. 40, and *Kinghorn v. Guthrie*, 50 Sc. L. R. 863. The decisions in these three cases do not help us in deciding the question which we have to decide in the case at bar.

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\* *Andrew v. Failsworth Industrial Society, Ltd.* [1904] 2 K. B. 32. *Davies v. Gillespie*, 28 T. L. R. 6. *Morgan v. Owners of Steamship Zenaida*, 25 T. L. R. 446. *Kelly v. Kerry County Council*, 42 Ir. L. T. R. 23. *Robson, Eckford & Co. Ltd. v. Blakey*, 49 Sc. L. R. 254. *Rodger v. Paisley School Board*, 49 Sc. L. R. 413. *Olson v. Owners of Steamship Dorset*, 6 B. W. C. C. 658. *Clifford v. Joy*, 43 Ir. L. T. R. 192. *Craske v. Wigan*, [1909] 2 K. B. 635. *Amys v. Barton*, [1912] 1 K. B. 40. *Kinghorn v. Guthrie*, 50 Sc. L. R. 863.

What the insurer's counsel has overlooked in his argument is that the circumstances of these two cases were not the same as those in the case at bar and that (even if they had been) where a case depends upon a question of fact opposite conclusions may be reached by different tribunals on the same evidence.

The finding of the county court judge in *Warner v. Couchman* which the House of Lords refused to disturb, was in these words: "That there was nothing in the nature of the appellant's employment which exposed him to more than the ordinary risk of cold which any person working in the open was exposed on that day." It is plain that the rule under which the finding against the employee in that case and the finding in favor of the employee in the case at bar were made is one and the same rule. Of this rule, Lord Loreburn in *Warner v. Couchman, ubi supra*, at page 37, said: "Now Fletcher Moulton, L. J., who was the judge in the minority in the Court of Appeal, stated the law fairly enough, or rather stated what was the point of view with which a judge ought to approach cases of this kind. He said [1911] 1 K. B. 357: 'It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise "out of the employment," because the man is not specially affected by the severity of the weather by reason of his employment.'"

In his argument counsel for the insurer has pointed out that the bags of fabric were not cold; that the petitioner's hands would be but little closed when he handled them; that after he had pushed the truck off the boat his hands were free while he was walking back to get another load and that he had ample opportunity to swing his arms and keep up his circulation at that time. All these were matters proper to be urged upon the board and to be considered by them in passing upon the question of fact upon which they had to pass. But they are not matters which are decisive of the question of law which we have to decide, namely, whether on the evidence as a whole the board were warranted in finding (as they did find) that the petitioner was exposed to "materially



greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date" in question.

Although the question is a close one, we are of opinion on the whole that the evidence before the board warranted the finding made by them. For a case where a finding was made in favor of an employee who had suffered from frostbite, and where the "Appellate Court" refused to overturn the decision, see *Canada Cement Co. v. Pazuk*, 22 K. B. 432.

*Decree affirmed.*

*J. T. Connolly*, (*M. J. Mulkern* with him,) for the insurer.

*W. H. Sullivan*, for the employee, submitted a brief.

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### WILLIS C. SANDERSON'S (dependent's) CASE.

Suffolk. April 6, 1916. — June 29, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

#### *Workmen's Compensation Act.*

Where a plumber's assistant, who had been sent by his employer to do some work for a customer that lived four miles away and was returning in the afternoon with a horse and wagon of his employer, was seen driving on the highway in a normal condition and five minutes later his unconscious body was found in the roadway at the left of the wheel tracks with a cut over the eye and a contused surface around it and bruises on the back of the head and on a shoulder and the horse with the wagon attached was found some distance away jogging along up the road, and where such employee died without recovering consciousness and an autopsy showed that all the organs of his body were in normal and healthy condition, that there was no diseased condition of the heart and that there had been a hemorrhage which had caused his death, it was held, that the cause of the employee falling from the wagon, if he did fall, was purely a matter of conjecture and that there was no evidence on which it could be found that the death of the employee was the result of an injury arising out of his employment within the meaning of St. 1911, c. 751, Part II, § 1.

CROSBY, J. This is an appeal from a decree of the Superior Court,\* based on a decision of the Industrial Accident Board ordering the Globe Indemnity Company to pay the sum of \$2,025

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\* Made by *Pierce, J.*

to Fannie E. Sanderson, the widow of Willis C. Sanderson, for his death.

The findings of the arbitration committee in substance were, that Willis C. Sanderson was a general workman, a plumber's assistant, employed by one Black; that on January 22, 1913, at 1.30 o'clock in the afternoon he left the shop of his employer in South Deerfield to go to Whately, a distance of about four miles, to do some work at the house of one Fleming, a customer of his employer; that he left the house of Fleming at five o'clock that afternoon with a horse and wagon of his employer to return to the shop in South Deerfield; that he was seen by one Connelley as he was driving on the highway leading from Whately to South Deerfield, apparently in a normal condition; "that five minutes later Connelley came upon his unconscious body lying in the roadway to the left of the wheel tracks; that his head was pointing south and his feet towards the north; that a blanket was found more nearly in the middle of the roadway, north of his feet; that Connelley saw the horse and wagon some distance away, jogging along up the road; that Connelley called Sanderson by name, but obtained no sign of recognition; that he then lifted his head and Sanderson groaned once; that Sanderson was lying on his right side, his right arm underneath him, and he partly rolled over when he groaned . . . that Sanderson's eyes were partly open; that he appeared to be unconscious."

The arbitration committee further found that he was taken to the Greenfield Hospital where it was found that there was a cut "over the right eye, an inch or an inch and a half in length, extending into the hair on the front of the head, and at its deepest point extending through the scalp to the skull and causing a slight hemorrhage from the periosteum; that there was a contused surface around the cut for about three inches; that there were black and blue marks found on the back of his hand and on the shoulder; . . . that the autopsy revealed that all the organs in the man's body were in normal and healthy condition; that there was no evidence of a diseased condition of the arteries or the heart; that the brain was examined . . . that it was found that there was a hemorrhage in the lateral ventricles and in the third and fourth ventricles; that it was found that the ventricles and the spinal canal were gorged by the hemorrhage and that the hemorrhage caused death." He died about three o'clock the next morning.

The committee further found, "There was no direct evidence tending to show how or in what manner Sanderson fell from the wagon. There was no positive evidence as to whether the hemorrhage did occur before or after he fell from the wagon, but from the circumstances as disclosed by all the evidence, we find as a fact that Sanderson either fell or was thrown from the wagon, while he was in the employ of said Black, returning from his work with his tools, to the shop of said Black, in South Deerfield, and that the cut and contusion which was found on his head immediately after the fall, and the black and blue spots, found on his shoulder and hand, were made by the fall."

The committee therefore found upon all the evidence, that Sanderson's death "was due to accident, while he was acting for his employer in the course of his employment."

Upon a claim for review, the Industrial Accident Board affirmed and adopted the finding of the committee and found upon all the evidence as follows: "That the employee, Willis C. Sanderson, received a personal injury arising out of and in the course of his employment, by reason of having been thrown from the wagon in which he was seated. The position of his body when found showed that he did not fall inertly from his seat, as would have been the case had he sustained an apoplectic shock preceding and causing the fall. The weight of all the evidence showed that he was thrown by an accident, and not by a stroke of apoplexy or other natural cause; and that he was thrown from the wagon by the sudden moving or starting of the horse, the horse having been found trotting along about three quarters of a mile away within five minutes from the time the employee had been seen driving him along the road. The body was found on the side of the road, beyond the beaten wheel tracks, where he would not naturally be found if he had fallen inertly because of a stroke of apoplexy; his head was pointing in a direction opposite to that in which he was driving. He was unconscious, evidently on the spot on which he struck, on his fall from the wagon. . . . The preponderance of all the medical and circumstantial evidence shows that a trauma preceded and caused the hemorrhage which resulted in the death of the said employee, and the board so finds."

It is plain that the injury was received while the employee was engaged in the regular work which it was his duty to perform

and so was received "in the course of his employment," under the meaning of Part II, § 1 of St. 1911, c. 751.

The more difficult question is, did the injury arise out of the employment under the same section of the act?

In *McNicol's Case*, 215 Mass. 497, it was said by the Chief Justice speaking for this court, that an injury "'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant." *Milliken's Case*, 216 Mass. 293.

The Industrial Accident Board have found that the injury arose out of the employment, and it is expressly provided by § 11 of Part III of the act as amended by St. 1912, c. 571, § 14, that the decree entered in the Superior Court "shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court" except that there shall be no appeal upon questions of fact. The findings of fact made by the Industrial Accident Board are equally conclusive with the findings of a judge, or the verdict of a jury, and are not to be set aside if there is any evidence to support them. *Pigeon's Case*, 216 Mass. 51. The Industrial Accident Board in the determination of questions of fact is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw, but its findings cannot properly be based merely upon conjecture or speculation. *Von Ette's Case*, 223 Mass. 56. *Sponatski's Case*, 220 Mass. 526.

The burden of proof rests upon the dependent to prove the facts

necessary to establish a right to compensation under the act. As was said in *Sponatski's Case*, *supra*, "The dependent must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim, before the dependents can succeed."

After a careful examination of the evidence presented to the arbitration committee and to the Industrial Accident Board, all of which is reported, we are of opinion that the dependent has failed to sustain the burden of proof by showing that the employee received an injury which arose out of his employment and that resulted in his death.

While there was ample evidence from which it could have been found that, so far as could be ascertained, the employee was in a normal and healthy condition, without any impairment of his arteries, or disease of any of the organs of his body, and that it was unusual for a man of his age to suffer a cerebral hemorrhage unaccompanied by some physical injury, still there seems to be an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. It could have been found that the blow upon the head was sufficiently severe to have caused the hemorrhage, but there is no evidence to show that such injury did produce the hemorrhage. In other words, a finding that the hemorrhage preceded the fall and caused the employee to fall from the wagon is as consistent with the evidence as is a finding that the hemorrhage was caused by the fall.

So far as the record discloses, no one saw the deceased that day while he was in the wagon on the highway, except Connelley, who saw him driving along, and about five minutes afterwards found him lying in the roadway in an unconscious condition. There is an entire absence of evidence to show how he got out of the wagon. The Industrial Accident Board finds that "he was thrown from the wagon by the sudden moving or starting of the horse;" the reason given for this conclusion being based upon the place where the body was found and its position upon the road. We are of opinion that such evidence would not warrant a finding that the

deceased was thrown from the wagon by the sudden starting of the horse. There is no evidence whatever that the horse did so start.

Many conjectures could be made as to the cause of the fall of the deceased, if he did fall. He might have fallen while standing up in order to wrap the blanket about him; he might have accidentally dropped his reins and lost his balance while leaning forward to pick them up; the horse might have shied; he might have fallen from weariness or sleepiness; or, as the insurer contends, he might have had an apoplectic seizure which produced the cerebral hemorrhage and caused his fall.

It is plain that if the hemorrhage was due to natural causes, and was not produced by the fall, it could not be found to be an injury arising out of the employment.

It is plain that the inference drawn by the Industrial Accident Board from the evidence, that the hemorrhage followed the injury and resulted therefrom, is based merely upon surmise, speculation and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence. It may be the dependent is correct in her contention that the death of the employee was due to a fall from the wagon, but other theories and conjectures are quite as probable. *Milliken's Case*, *ubi supra*. *Williams v. Citizens' Electric Street Railway*, 184 Mass. 437. *Thackway v. Connelly & Sons*, 3 B. W. C. C. 37. *Barnabas v. Bersham Colliery Co.* 3 B. W. C. C. 216. *Perry v. Ocean Coal Co. Ltd.* 5 B. W. C. C. 421. *Jenkins v. Standard Colliery Co. Ltd.* 5 B. W. C. C. 71. *Wood v. D. Davis & Sons, Ltd.* 5 B. W. C. C. 113. *Butler v. Burton-on-Trent Union*, 5 B. W. C. C. 355. *Charvil v. Manser & Co. Ltd.* 5 B. W. C. C. 385. *Marshall v. Owners of Steamship Wild Rose*, [1910] A. C. 486. *Rodger v. Paisley School Board*, 5 B. W. C. C. 547. *Robson, Eckford & Co. Ltd. v. Blakey*, 5 B. W. C. C. 536. *Lewis v. Port of London Authority*, 7 B. W. C. C. 577.

The recent case of *Carroll v. What Cheer Stables Co.* 38 R. I. 421, is distinguishable from the case at bar. The workmen's compensation act of Rhode Island, unlike ours, and like the English act, provides that the injury must be sustained by an employee by "accident." In that case the employee, a hack driver, while helpless from dizziness or unconsciousness occasioned from a disease from which he was suffering, was thrown

from his seat; there was direct evidence from an eyewitness that his horse ran against the curbstone and he fell off. It was held that the fall was an accident arising out of his employment within the meaning of the act. See also *Wicks v. Dowell & Co. Ltd.* [1905] 2 K. B. 225; *Owners of Steamship Swansea Vale v. Rice*, 4 B. W. C. C. 298; *Moore v. Manchester Liners, Ltd.* 3 B. W. C. C. 527.

The decree of the Superior Court must be reversed and a decree entered declaring that the dependent is not entitled to compensation.

*So ordered.*

The case was submitted on briefs.

*J. T. Connolly & M. J. Mulkern*, for the insurer.

*F. J. Lawler*, for the dependent widow.

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### B. FARNHAM SMITH vs. WORCESTER AND SOUTHBRIDGE STREET RAILWAY COMPANY.

Suffolk. October 20, 1915. — July 6, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

*Assignment. Pledge. Corporation. Attempted over-issue of stock.*

A trust company in good faith took as collateral security for a loan an instrument purporting to be a certificate for shares in a street railway corporation. This instrument was identified as part of an attempted fraudulent over-issue of stock after all the authorized capital stock of the street railway corporation had been issued. Later the trust company made an assignment under seal to certain persons of "all claims and demands of every description and kind against the" street railway corporation "amounting to \$77,062.22, which claims or demands are annexed to this assignment." The only thing annexed to the assignment was a certified copy of a vote of the directors of the trust company authorizing its treasurer "to execute in behalf of this company an assignment of its claims against the [street railway corporation] amounting to \$77,062.22 to" the persons named as assignees. *Held*, that the instrument held as collateral by the trust company, being void as a certificate, gave the trust company merely a right of action against the street railway corporation based on the ground that the street railway corporation was estopped to deny that the trust company was a holder of its shares, and that this claim and demand passed by the assignment to the assignees and no longer belonged to the trust company, which therefore could not maintain a suit in equity to compel the street railway

corporation to issue to it a new certificate for the number of shares named in the instrument.

In a suit in equity brought by the trust company against the street railway corporation to compel the issuing of a new certificate to the plaintiff for the number of shares of stock of the street railway corporation named in the instrument described above, there was evidence on which the trial judge could have found that at the time the assignment was given it was known by all the parties that the persons represented by those named as assignees wished to obtain an assignment of all claims and demands against the street railway corporation for the purpose of effecting a reorganization which could not be carried through without obtaining all such claims and demands, of which that based on the possession of the alleged certificate was one, and it was *held*, that, if the judge found this fact, he was right, in view of all the circumstances disclosed by the evidence, in construing the assignment to include the claim.

LORING, J. This is an action for wrongfully refusing to issue to the plaintiff a new certificate for shares in the capital stock of the defendant corporation on the surrender of a certificate for shares dated February 11, 1903. The action was really brought by the International Trust Company for which the plaintiff held the certificate as a volunteer. The judge,\* before whom the case was tried without a jury, found that the original certificate was part of an attempted fraudulent over-issue of the defendant's capital stock after it and all of it had been issued, and for that reason that it was void. The contention on which the plaintiff based his claim was that the defendant was estopped to dispute the trust company's claim that it was a stockholder because it took the original certificate as collateral for a loan in good faith and for value. The defendant's answer to this contention was that the trust company was put upon inquiry by the form of the certificate and that, if it had made the inquiry which it should have made, it would have learned that the original certificate was part of a fraudulent over-issue of capital stock and so void.

We do not find it necessary to pass upon that question. The judge found that "The assignment dated January 18, 1904, evidenced by Exhibit 16, by the International Trust Company to Rice and Hoar released any claim in favor of the International Trust Company against the Worcester & Southbridge Street Railway Company arising out of the possession by the said trust company" of the original certificate here in question. To that finding the plaintiff took an exception.

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\* Hardy, J. He found for the defendant; and the plaintiff alleged exceptions.



By the assignment of January 18,\* the trust company assigned, transferred and conveyed to William E. Rice and Rockwood Hoar "all claims and demands of every description and kind against the Worcester & Southbridge Street Railway Company, said claims together with interest thereon to January 4, 1904, amounting to seventy-seven thousand & sixty-two 22/100 Dollars, which claims or demands are annexed to this assignment."

\* "Exhibit 16. Know all men by these presents That International Trust Company (of Boston), in consideration of one dollar and other valuable considerations to it paid by William E. Rice and Rockwood Hoar, the receipt whereof is hereby acknowledged, does hereby assign, transfer and convey to said William E. Rice and Rockwood Hoar, their heirs and assigns, all claims and demands of every description and kind against the Worcester & Southbridge Street Railway Company, said claims together with interest thereon to January 4, 1904, amounting to seventy-seven thousand & sixty-two 22/100 Dollars, which claims or demands are annexed to this assignment. And the said corporation does hereby appoint said William E. Rice and Rockwood Hoar, or either of them, its attorney or attorneys irrevocable, in its name and for its account, but without expense to it, to sue for, recover, release, discharge, compromise, prove in bankruptcy or with the Receivers of said Company said claim, or to bring suit against any person or partnership or corporation who may be liable thereon directly or indirectly; and to assent or object to any action of the Receivers, and generally to deal with the same as fully and completely as it could do if acting through its officers. Meaning and intending by this instrument to transfer and assign to the above named assignees all claims which it may have against the said Worcester & Southbridge Street Railway Company, or any person or persons who may be liable in any way for said claims.

"In witness whereof the said International Trust Company (of Boston) has caused its name to be signed, and its seal affixed by Henry L. Jewett, its treasurer duly authorized by vote, a copy of which vote is annexed, this 18 day of January, in the year One Thousand Nine Hundred and Four.

International Trust Company

Seal

By Henry L. Jewett,  
Treasurer."

"At a meeting of the directors of the International Trust Co. held on Monday, Jan. 18th., a quorum being present, it was unanimously voted:

"That Henry L. Jewett, Treasurer, be authorized to execute in behalf of this Company an assignment of its claims against the Worcester & Southbridge Street Railway Company amounting to \$77,062.22 to William E. Rice and Rockwood Hoar.

"A true copy.

attest:  
Seal.

Henry L. Jewett,  
Secretary."

Annexed to the assignment was a copy of a vote of the directors of the International Trust Company authorizing the treasurer "to execute in behalf of this Company an assignment of its claims against the Worcester & Southbridge Street Railway Company amounting to \$77,062.22 to William E. Rice and Rockwood Hoar."

Unless the copy of this vote was a statement of the "claims and demands" of the trust company against the street railway company no statement of those "claims and demands" was annexed to the assignment.

The plaintiff has contended (1) that shares of stock do not come within the term "all claims and demands of every description and kind against the Worcester & Southbridge Street Railway Company;" (2) that the claims and demands covered by the assignment were stated in a schedule annexed to the Exhibit and consisted of promissory notes and an overdraft due the company amounting in all to \$77,062.22; and (3) that the defendant is not entitled to the benefit of the assignment to Rice and Hoar.

The original certificate issued to Bailey and assigned by him to the trust company was not a certificate for shares of stock. It was found by the judge (and on the evidence no other finding could have been made) that the original certificate issued to Bailey was an attempted fraudulent over-issue of stock after all of the capital stock of the defendant street railway company had been issued. It follows that the original certificate held by the trust company was not a certificate of shares of stock.

It may be that the railway company was estopped to deny the truth of the facts stated in the original certificate, namely, that Bailey was the holder of one hundred shares in the capital stock of the street railway company. But if it was estopped to deny that fact (and for the purposes of this discussion we assume that there was such an estoppel) that does not make the holder of the certificate the holder of shares of stock. It gives to the holder of the certificate a right of action based upon the ground that the street railway company is estopped to deny that he is the holder of shares of stock. But it does not make the holder of the certificate a holder of shares in the capital stock of the corporation. In the case at bar where the identity of the shares which were over-issued is not lost, this result necessarily follows. Speaking accu-

rately, therefore, the right which the trust company got (if it took this certificate in good faith) was not that of a holder of shares in the capital stock of the street railway company, but a right of action based upon the fact that the street railway company was estopped to say that what the holder of this certificate had was not shares of stock. That was "a claim or demand" against the street railway company.

There was nothing annexed to the assignment of January 18, 1904, stating the claims which made up the claim of \$77,062.22. The vote authorizing the trust company to assign "its claims . . . amounting to \$77,062.22" does not purport to be such a statement. In addition all that is dealt with in this vote are "its claims." The assignment covered "all claims and demands of every description and kind against" the street railway company. If the assignment covers more than the claims amounting to \$77,062.22 its execution by Jewett was not authorized by the vote annexed to it. But it may have become binding upon it by force of subsequent events and action on its part. No question on this point has been raised by the plaintiff.

The last contention of the plaintiff is that the defendant is not entitled to the benefit of an assignment to Rice and Hoar. Whether the defendant is or is not entitled to the benefit of an assignment to Rice and Hoar is not of consequence. If the plaintiff's claim or demand against the street railway company which it had by reason of having taken the original certificate for one hundred shares in good faith passed by that assignment to Rice and Hoar, the trust company had ceased to be the owner of it when it undertook to assign it to the plaintiff and it never passed to him.

In addition to these contentions made by the plaintiff in this behalf, there is another matter not urged by him but which might throw doubt upon the construction of the assignment adopted by the presiding judge.

The assignment of January 18, 1904, was made to Rice and Hoar as representatives of Wells and Thayer who were then undertaking to reorganize the affairs of the street railway company. In the preceding August Bailey's frauds had become known, and at the request of Thayer (the president of the defendant railway company) Bailey had resigned his position as treasurer. Thereafter Thayer and Wells (who were indorsers upon notes of the street

railway company) undertook to reorganize the affairs of the corporation. An offer of fifty per cent upon the money demands against the defendant street railway company had been recommended by a committee of its creditors. The result of the conferences between Wells and Thayer and the trust company was that the trust company sold to them (Wells and Thayer) its fifty per cent dividend on its money demands against the street railway company (which demands amounted to \$77,062.22), and its claim as holder of certificates for ten hundred and forty shares of the defendant's "stock" (all of which was and was known to be an over-issue) and in payment for it received from Wells and Thayer a promissory note dated January 1, 1904, in the sum of \$89,260.74. As a part of that note an agreement was executed between Wells and Thayer (parties of the first part) and the trust company (party of the second part) as to the way in which it could be paid. In that agreement it was recited that Wells and Thayer had bought of the trust company ten hundred and forty shares of the capital stock of the street railway company, and a "dividend of fifty per cent on claim of \$77,062.22 against said Railway Company, paying therefor with a note of even date herewith for the sum of \$89,260.74." Inasmuch as this note of \$89,260.74 was the consideration for the assignment of January 18, 1904 (here in question), and this agreement as to the method in which the note of \$89,260.74 could be paid was a part of that transaction, it well might have been urged that although the rights given by possession of the void certificates of stock were in law "claims and demands," yet those words as used by the parties in the assignment of January 18, 1904, did not include claims and demands arising out of the fact that the trust company had taken these certificates in good faith. For these claims and demands are spoken of as "stock" in that agreement. But in determining the true construction of the words of the assignment of January 18, 1904, (namely, "all claims and demands of every description and kind against the Worcester & Southbridge Street Railway Company,") there is one other fact of importance—or rather the judge was justified in finding a fact—which was of importance in that connection. That fact is this: At the time of this assignment of January 18, 1904, (which was really cotemporaneous with and part of the transaction of which the note and agreement of January 1,

1904, were part) the president of the trust company who acted for the trust company in making the assignment and the agreement which went with it, knew that Wells and Thayer were endeavoring to reorganize the street railway company and for that purpose that it was essential that they should obtain an assignment of all claims and demands of every kind and description which the trust company had against the street railway company. In addition the judge was warranted in finding that the president of the trust company (in effect) told Wells and Thayer and the persons acting for them that the number of shares (the issue of which was valid or invalid) held by the trust company was ten hundred and forty. He himself testified that by an arrangement with Bailey he held back from Wells and Thayer and their representatives knowledge of the fact that he had this alleged certificate for one hundred more shares in the street railway company. The reason he gave for withholding this information from Wells and Thayer and their advisors was that the shares represented by all of these certificates were obtained by the trust company from Bailey as security for notes of Bailey held by the trust company, and Bailey in authorizing the trust company to part with the ten hundred and forty shares requested the trust company to hold back the one hundred shares or what purported to be the one hundred shares here in question.

The question of the true construction of the assignment of January 18, 1904, is a question of law, and it is for us to decide whether the construction given to it by the judge was right. But we must decide that question of law not in the light of what we think were the circumstances under which that assignment was made, but in the light of what the judge was warranted in finding those circumstances to have been. The judge could have found that it was known to all the parties at that time that Wells and Thayer wished to obtain an assignment of all claims and demands against the street railway company; and that unless they obtained an assignment of all those claims and demands they were not in a position to carry through the reorganization which they were undertaking to effect; and further, that unless the assignment in question did transfer to them all the trust company's claims and demands against the street railway company, they did not get an assignment of all its claims and demands

against the street railway company. We are of opinion that, if the judge found these facts, he was right in construing the assignment dated January 18, 1904, as he did.

*Exceptions overruled.*

*R. M. Morse, (J. R. Lazenby with him,) for the plaintiff.*

*J. L. Hall, (E. S. Kochersperger with him,) for the defendant.*

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### PATRICK COMERFORD'S CASE.

Suffolk. March 21, 1916. — July 10, 1916.

Present: RUGG, C. J., LORING, BRALEY, DECOURCY, & PIERCE, JJ.

*Agency, Existence of relation. Workmen's Compensation Act.*

Where a contractor in a city, who had agreed to construct a small brick garage in a neighboring village called M, applied to a master teamster for "a teamster to take some concrete window-sills, wheelbarrows, picks and shovels out to M the next morning," and the next morning an employee of the teamster was sent with a team, and, while under the direction of the son of the contractor he was assisting in loading the window-sills on the team, he slipped and the sill they were carrying fell on him, causing injury, upon a claim under the workmen's compensation act it cannot be found that such employee of the master teamster was in the employ of the contractor at the time of his injury.

St. 1911, c. 751, Part III, § 17, provides that, "If a subscriber [under the workmen's compensation act] enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or subcontractors were subscribers." If a contractor, who is a subscriber under the workmen's compensation act and has contracted to build a small brick garage, hires from a master teamster a teamster and a team to transport concrete window-sills, wheelbarrows and picks and shovels from the storehouse of the contractor to the place where they are to be incorporated into the proposed structure or are to be used in building it, such transportation may be found to be a part of the work of the contractor comprised in his contract, and, if so found, compensation under the statute may be awarded to a teamster who was sent in charge of the team and who sustained an injury arising out of and in the course of his employment in such transportation.

PIERCE, J. The evidence shows that the employee, Comerford, was and had been for three years before the accident in the employ of one Connors as a teamster; that the subscribers, McDonald and Joslin Company, speaking through a son of Joslin, the evening before the accident told Connors that they "wanted a teamster to take some concrete window-sills, wheelbarrows, picks and shovels out to Mattapan the next morning;" that these things to be taken were in the locker or enclosure at the corner of Langdon and Roswell Streets; that the "locker" is just a storehouse where odds and ends of tools and staging are kept; that the subscribers' business was contracting, building and construction work; that at the time of the accident the subscribers were constructing a small brick garage in Mattapan; that these reinforced concrete window-sills were wanted for the garage then being built; that on the morning of the accident the employee drove into the "locker" or enclosure, as directed by the son who had given the order to Connors, and backed up near to a pile of stone; that the son told the employee that "he wanted to get four of these sills on the team;" that there were some broken ones on the top of the pile and they moved these off and laid them down on one side; that they carried two of the sills to the team and were carrying the third, when the employee slipped and the sill fell on him.

These facts do not warrant the findings of the Industrial Accident Board that "During all the time that Comerford was on the premises, after he had driven the team into the 'locker,' he was engaged in the usual course of the business of the subscribers and was the servant of such subscribers during his employment on said premises." Nor do they warrant the further and more specific finding that "Comerford, in the performance of the work of lifting and moving the sills, was under the control and direction of the subscribers, and was the servant and employee of the subscribers in the performance of this work, which was in the usual course of their business as building contractors." \*

Upon the facts in this case the employee can be found to be the servant of his general employer, Connors, because of his duty to

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\* In the Superior Court a decree was entered by order of *Wait, J.*, affirming the decision of the Industrial Accident Board and ordering the payment to the insured of \$198 in full for all incapacity resulting from the injury. The insurer appealed.

care for and to manage the team of Connors; and cannot be found to be the servant of the subscriber because he was to carry and to load concrete sills which were to be selected from a pile of sills by the subscriber, or because in lifting and carrying the sills he was assisted by the son of the subscriber. *Pigeon's Case*, 216 Mass. 51. *King's Case*, 220 Mass. 290. *Tornroos v. R. H. White Co.* 220 Mass. 336. *W. S. Quinby Co. v. Estey*, 221 Mass. 56. *Peach v. Bruno, ante*, 447.

So far as the record discloses, the work of loading and of transportation was to be performed by Connors, through his servant, in his own way. Connors was, therefore, an independent agent or contractor. The subscribers entered into an oral contract with the independent contractor, Connors, to do that part of the subscribers' work which consisted in conveying specific articles from the premises of the subscribers to the place where the "material" was designed to be used in the performance of the subscribers' contract:

The conveyance of picks, shovels, wheelbarrows and of constructed and fabricated parts of a building from the storehouse of a builder and contractor, to the premises where they are to be used or are to be combined into a proposed structure, may be found to be a part of the trade or business of a contractor and is not necessarily an act merely ancillary and incidental to the business of that contractor.

St. 1911, c. 751, Part III, § 17, in part reads, "If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or subcontractors were subscribers." We are of opinion that the facts of the case at bar may be found to bring it within this statute. *Sundine's Case*, 218 Mass. 1.

The case is to be recommitted to the Industrial Accident Board, where the employee may move for a hearing and for the intro-



duction of further evidence upon the question whether the work performed by Comerford was a part of the business of McDonald and Joslin Company or was merely ancillary and incidental thereto.

If such motion is granted the case should be considered anew upon all the evidence introduced by all parties, and such decision should be made upon the facts as the Industrial Accident Board think is required by the evidence.

*So ordered.*

*J. F. Scannell*, for the insurer.

*E. M. Shanley*, for the employee, submitted the claim without argument or brief.



**JULIET F. LLOYD vs. IMPERIAL MACHINE STAMPING AND WELDING COMPANY & others.**

Suffolk. March 21, 22, 1916. — July 12, 1916.

Present: RUGG, C. J., LORING, BRALEY & DE COURCY, JJ.

*Equity Pleading and Practice*, Bill, Decree. *Equity Jurisdiction*, To enforce collection of negotiable instrument, Equitable replevin.

A bill in equity cannot be maintained to enforce the collection of certain negotiable bonds of which the plaintiff alleges that he was deprived unjustly by the defendant who procured possession of them by fraud and deceit, because a suit to collect a negotiable instrument can be maintained only by its holder.

A plaintiff in equity, who alleges that he is entitled to become the holder of certain negotiable bonds and who wrongly has brought a bill to enforce the collection of the bonds which are not in his possession, cannot obtain the relief he seeks by amending his bill into a bill for equitable replevin, because, if the court should take jurisdiction of the bill as one of equitable replevin, it could not retain jurisdiction for the purpose of compelling the defendant to pay the bonds, such relief not being an incident to a bill of equitable replevin.

In a suit in equity, where it is plain that the plaintiff has mistaken his remedy, if he has any, the better practice is, even where an absolute decree dismissing the bill would not be a bar to any proper action or suit to enforce the rights of the plaintiff in the matters complained of, to provide in the decree that the bill is dismissed without prejudice, and it so was ordered in the present case.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on August 3, 1915, and containing the allegations stated in the opinion.

The defendant Buff demurred to the bill. The case was heard

on the demurrer by *Pierce, J.*, who made an order for a decree sustaining the demurrer. On motion of the plaintiff an interlocutory decree was made that the bill be taken *pro confesso* against the defendant the Imperial Machine Stamping and Welding Company.

By order of *Pierce, J.*, a final decree was entered sustaining the demurrer of the defendant Buff and ordering that as against him the bill be dismissed. The plaintiff appealed.

*G. L. Wilson*, for the plaintiff.

*W. M. Richardson*, (*W. P. Everts* with him,) for the defendant Buff.

LORING, J. This case comes up on an appeal from a decree dismissing the bill entered on an order sustaining a demurrer filed by the defendant Buff. In her bill the plaintiff alleged that in the summer of 1909 she became the owner of seventy-one first mortgage bonds of the defendant welding company; that these bonds were part of an issue of seven hundred secured by a mortgage of certain rights in an invention, future improvements thereon and patents securing the same, together with drawings, patterns, machines, machinery and equipment for the manufacture of the machines covered by the invention and patent; that after making the mortgage the welding company by an indenture dated September 5, 1911, transferred the exclusive right, title and interest to the property covered by the mortgage to the defendant Buff and another, in consideration of and conditioned upon the grantees paying a royalty therein described for all machines manufactured and sold by them under the patent. It is further alleged that by said royalty indenture the welding company agreed that Buff and his associate might have the mortgage securing the seven hundred bonds aforesaid discharged at their own sole expense, and coupled with that authority was an agreement by Buff and his associate that they would "indemnify and save harmless" the welding company "from any loss, costs, charges, damages, expenses, suits, actions, and proceedings at law or equity" which the welding company "might bear, sustain, be at, or be put to, for or by reason or on account of the said bond mortgage" aforesaid, "or the rights of any holders of any of the bonds issued thereunder." The bill then alleged that in March, 1914, the defendant Buff procured possession of the plaintiff's bonds through fraud and

deceit; but that the defendant Buff asserts that he purchased the bonds from the plaintiff at that time. It is then alleged that the mortgage was foreclosed in April, 1915. It is averred that the mortgage contained a provision that in case of a foreclosure of the mortgage "the principal of all outstanding bonds should forthwith become due and payable notwithstanding anything contained in said bonds" (and it appears from an inspection of the bonds that there is nothing to that effect in the bonds). It is averred that by reason of the foreclosure and by virtue of this provision in the mortgage, the principal sum of the seventy-one bonds aforesaid has become due and payable and that the welding company now owes the plaintiff the principal of the bonds and the unpaid interest coupons thereto attached. It is then alleged "that upon judgment being rendered therefor against the defendant . . . welding company the said company is entitled to recover over against the defendant Buff the amount of said judgment;" that Buff controls the welding company and for that reason that the welding company would not enforce its right to recover indemnity from Buff "in respect of any judgment the plaintiff might obtain against said corporation in an action at law;" and that the welding company is insolvent. It is then alleged that Buff is the owner of a valuable interest as stockholder in the corporation which the plaintiff desires to reach and apply "in payment of her said claim against the defendant Buff."

The foundation of the plaintiff's bill is a right on her part to collect from the welding company the principal of her bonds or (if that is not now due) the amount of the interest coupons which have matured. It is the settled law of this Commonwealth that the right to collect a negotiable instrument is in the holder of it. *National Pemberton Bank v. Porter*, 125 Mass. 333. *Lowell v. Bickford*, 201 Mass. 543, and cases cited.

From this it follows that a person who is not the holder of a negotiable instrument but who is entitled to become the holder of it is not in a position to bring an action or suit to collect it. On the face of the bill the plaintiff is not now the holder of the seventy-one bonds here in question. Putting her allegations at the highest she has a right to become the holder of those bonds but she is not now the holder of them.

The bill does not contain the allegations which are necessary

to make it a bill of equitable replevin. The most favorable assumption for the plaintiff is that it might be amended into such a bill. Treating the bill as so amended, the plaintiff cannot have the relief sought in this bill unless the relief here sought would be given to her as an incident to a bill of equitable replevin. It is plain that a court of equity which had taken jurisdiction of this bill as a bill of equitable replevin would not keep jurisdiction of it for the purpose of giving to the plaintiff the relief which she seeks in this bill on the ground that having taken jurisdiction of the cause it would keep jurisdiction to administer full relief.

It follows that the bill in this suit is bad. Until the plaintiff becomes the holder of them she has not the right to collect these bonds. In addition if the bill were amended so as to make it a bill of equitable replevin, the relief here sought is not an incident to such a bill.

Under these circumstances, it is not necessary to consider the further difficulties which lie in the plaintiff's path in her endeavor to collect the amount of these bonds from the defendant Buff.

A decree dismissing this bill would not be a bar to any proper action or actions, suit or suits, to enforce the rights of the plaintiff in the matters here complained of. *Capaccio v. Merrill*, 222 Mass. 308. In spite of that, the better practice in such a case is to provide in the decree that the bill is dismissed without prejudice. The decree should be modified in that way, and so modified should be affirmed. It is

*So ordered.*

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GEORGE A. WOODS vs. NATHAN MATTHEWS & another, trustees.

Suffolk. March 23, 1916. — June 20, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Agency*, Broker's commission. *Broker*.

Where the owner of a hotel employed a real estate broker to find a tenant for it and the broker procured a person who executed with the owner a "memorandum of agreement" drafted with great care and setting forth certain terms of a proposed lease to be executed by the parties and "the principal points of their

joint understanding," but which did not contain "all that the lease was intended to contain" and left the unexpressed terms of the lease to be agreed upon subsequently between the parties, and where the parties subsequently failed to agree on such terms and after certain negotiations the proposed tenant refused to take a lease of the hotel on the terms required by the owner, the broker cannot recover a commission for his services, because, in an action brought by him against the owner for such a commission, there is no evidence that the proposed tenant was ready and willing to become a tenant of the hotel on the owner's terms or that the owner accepted him as such a tenant.

CONTRACT against Nathan Matthews and George E. Howe, trustees, to recover the sum of \$6,581.52 alleged to be due to the plaintiff for services rendered to the defendants by the plaintiff as a real estate broker in procuring a person ready and willing to become a tenant of the Hotel Oxford in Boston under a twenty year lease on certain specified terms, who was accepted by the defendants as such tenant. Writ dated December 4, 1912.

The declaration originally contained two counts. Afterwards a third count was added by amendment, which was as follows:

"Count 3. The plaintiff says that he is a real estate broker with a usual place of business in Boston in the county of Suffolk; that the defendants as trustees were the owners of certain hotel property known as the Hotel Oxford situated on the corner of Huntington Avenue and Oxford Terrace, Boston, Massachusetts, and consisting of a five story brick building and certain land, the entrance of said building being numbered 40 Huntington Avenue.

"And the plaintiff says that the defendants were desirous of finding a tenant for said premises and that from about the fourteenth day of October, 1912, acting as broker in the employ of the defendants, the plaintiff expended a large amount of time and labor and finally procured and introduced to the defendants a man by the name of Archie E. Hurlburt; that thereafter on the twenty-sixth day of October, 1912, the defendants and the said Archie E. Hurlburt entered into a written agreement for the leasing by the defendants to the said Hurlburt of the said building. A copy of said agreement omitting the signatures is hereto annexed marked 'A.'

"And the plaintiff says that the defendants agreed at the time they employed him to pay him the usual and ordinary commission for the services rendered by the plaintiff to the defendants; that

the plaintiff has in all ways fulfilled the terms of his agreement but that the defendants have refused to pay him.

"Wherefore the plaintiff says that the defendants owe him the sum of six thousand five hundred eighty-one dollars and fifty-two cents (\$6,581.52) being said reasonable and proper commission, with interest from the 26th day of October, 1912.

"This added count is for the same cause of action as counts 1 and 2."

The copy of the agreement annexed to the declaration, omitting the signatures, was as follows:

"Memorandum of Agreement made this twenty-sixth day of October, A.D. 1912, by and between Nathan Matthews and George E. Howe, Trustees, parties of the first part, and Archie E. Hurlburt, party of the second part.

"The parties of the first part agree to lease to the party of the second part the hotel property known as the Hotel Oxford situated on the corner of Huntington Avenue and Oxford Terrace, Boston, Mass., consisting of five story brick building and about 24,706 square feet of land, with entrance being numbered 40 Huntington Avenue.

"The above described property to be rented on a lease of twenty (20) years from November 1, 1912, to include land upon which the hotel stands and space of ten or fifteen feet in the rear, also right of way over 20 foot passageway to the east of the building, and a right of light and air over one-half of the park in the rear.

"And the party of the second part agrees to pay therefor an annual rental of Twenty thousand dollars (\$20,000) for the first two (2) years, Twenty-five thousand dollars (\$25,000) for the next three (3) years, and an annual rental of Thirty thousand dollars (\$30,000) for the balance of the term of the lease, and all taxes and fire insurance premiums, said rent to be paid in monthly installments on the first of each and every month. Taxes and insurance to be paid monthly pro rata. If his gross receipts exceed Two hundred thousand dollars (\$200,000) per annum for the first or second year or both, the excess over that amount in each year up to Five thousand dollars (\$5000) shall be paid at the end of each year by the party of the second part as additional rent, and if at the end of the third, fourth, and fifth years respec-

tively the gross receipts shall exceed the sum of Two hundred fifty thousand dollars (\$250,000) the excess over that amount in each year up to Five thousand dollars (\$5,000) shall be paid by the party of the second part at the end of each year as additional rent. At the end of ten (10) years an appraisal shall be made to settle an increase of rent for the balance of the term of the lease. Said increase to be at the rate of six per cent (6%) on the excess of the value of the land as made in said appraisal over the sum of \$300,000. And said party of the second part agrees to pay said increase if any there be as herein specified.

"The liquor license to be taken over and paid for in cash by the party of the second part at its present value to be bought back by the party of the first part upon cancellation or expiration of the lease at its then value.

"And the party of the second part shall have the right to purchase such of the present furniture as he may desire to be taken over on appraisal at a fair value in use. And the party of the second part agrees to buy the stock on hand at cost, to be paid for in cash.

"And the parties of the first part agree that the sum of Ten thousand dollars (\$10,000) shall be allowed out of the first year's rent for alterations of the entrance or entrances and for the renovation of the building, provided the party of the second part spends that amount. And said party of the second part agrees to change the entrance on plans approved by the parties of the first part, said change to be carried out under the supervision of an architect satisfactory to the parties of the first part.

"In case of loss or damage by fire the parties of the first part will restore the building provided the public authorities permit and the cost does not exceed the amounts paid by the insurance companies, a proportionate part of the rent to be abated during reconstruction.

"It is understood that the lease is made subject to existing leases for stores and suites which leases shall be assigned to the party of the second part. All rents and accounts receivable November 1, 1912, shall be collected by the party of the second part and paid to the parties of the first part.

"It is agreed by both parties that the within agreement is a memorandum of the principal points of their joint understanding

and that the lease shall contain the usual and customary covenants for the lease of a hotel although not specified herein, which lease shall be executed by both parties to this agreement on or before November 1, 1912."

In the Superior Court the case was tried before *King, J.* The evidence is described in the opinion. At the close of the evidence the judge on the defendants' motion ordered a verdict for the defendants on the first two counts on the ground that there was no evidence warranting a verdict for the plaintiff on either of those counts.

The judge submitted the case to the jury on the third count, which he "construed as charging an agreement by the plaintiff to procure a tenant for the Hotel Oxford," and, subject to the defendants' exception, gave to the jury the following instruction:

"5. If you find that the defendants employed the plaintiff to procure a tenant or lessee, or to procure a person who would take a lease of the Hotel Oxford, and that the plaintiff, acting solely in the interest of the defendants, secured Hurlburt to take a lease, and Hurlburt accepted the terms of the defendants and was accepted as a person able, ready, and willing to take a lease by the defendants, then, in the absence of any misrepresentations on the part of the plaintiff, you must find a verdict for the plaintiff."

The judge also submitted to the jury three special questions, which, with the answers of the jury, were as follows:

"1. If any agreement was made between the plaintiff and the defendants as to the nature of the plaintiff's employment, what did the plaintiff and the defendants then understand that the plaintiff was employed to do?"

The jury answered: "The plaintiff was employed to procure a tenant for the Hotel Oxford."

"2. Were the defendants induced to sign the so called memorandum or contract of October 26, 1912, by reason of any false or fraudulent representations by the plaintiff Woods?"

The jury answered: "No."

"3. While the relation of agent and principal existed between the plaintiff and the defendants, was the plaintiff at any time lacking in any respect in fidelity to his principal?"



The jury answered: "No."

The jury returned a verdict for the plaintiff in the sum of \$7,091.58; and the defendants alleged exceptions.

*W. G. Thompson, (G. E. Mears with him,)* for the defendants.

*D. E. Hall, (F. Shurtleff with him,)* for the plaintiff.

PIERCE, J. Under the third count, the only one finally submitted to the jury, the plaintiff declared and the jury expressly found that he (the plaintiff) was employed by the defendants to procure a tenant for the Hotel Oxford.

It was admitted that the plaintiff under his employment introduced to the defendant Matthews one Hurlburt, a person who had in mind the leasing of the Hotel Oxford; that the defendants and Hurlburt discussed the terms of a possible lease; that they agreed as to "the principal points;" that Hurlburt withdrew from the negotiations before there was a final determination of all the questions in issue between them; and that Hurlburt never, in fact, became a tenant.

It was further admitted that on October 26, 1912, the defendants and Hurlburt executed and delivered the one to the other a paper which was drawn by the plaintiff and entitled "Memorandum of Agreement." The plaintiff contends that this memorandum of agreement, in connection with the acts and declarations of the parties to it, warrants, if it does not require, a finding of fact that Hurlburt was ready, willing and able to take a lease of the Hotel Oxford on the terms of the defendants, and, also, that the defendants came to an agreement with him to accept him as their tenant and began to make out a lease to him.

There was evidence that the memorandum was drafted with great care to express accurately and to cover the main points of their understanding. To provide for points undecided and then under discussion, there was inserted in the agreement, by the plaintiff, a paragraph that read: "It is agreed by both parties that the within agreement is a memorandum of the principal points of their joint understanding and that the lease shall contain the usual and customary covenants for the lease of a hotel although not specified herein, which lease shall be executed by both parties to this agreement on or before November 1, 1912."

In the memorandum the defendants "agree to lease to the party of the second part [Archie E. Hurlburt] the hotel property known

as the Hotel Oxford . . . to be rented on a lease of twenty (20) years from November 1, 1912," and "the party of the second part agrees to pay therefor an annual rental of Twenty thousand dollars (\$20,000)" in the manner and form therein set down.

It is unnecessary to refer further to the contents of the memorandum otherwise than to state that it contained provisions relating to the transfer of the liquor license, to the purchase of the furniture of the hotel, to a proposed alteration of the entrance or entrances, and for the renovation of the building, to the obligation to restore the building in case of fire, and to an abatement of rent during restoration.

There was evidence that, following the execution of the memorandum agreement the defendants congratulated the plaintiff "upon the closing of the matter up so promptly;" that they urged the plaintiff to make a speedy delivery of Hurlburt's original; that they dictated a letter for the plaintiff to send to Hurlburt wherein it was stated that the defendants "have just decided to accept the contract and have signed both copies;" that Hurlburt admitted that he had signed a contract to lease the Oxford; that Matthews said "he was ready and willing to put the deal through on the basis of the contract if Hurlburt could be prevailed upon."

As has been stated, the customer, Hurlburt, refused to go on before he and the defendants had come to an agreement upon the terms which were under discussion at the time of the execution of the memorandum of the agreed terms. It is contended by the defendants that the memorandum or contract by its very statement that it "is a memorandum of the principal points of their joint understanding," uncontrovertibly establishes that it was a preliminary contract only, and that Hurlburt upon the entire evidence could not as a matter of law have been ready, willing and able to become a tenant of the defendants upon terms then the subject of controversy between them. It also is argued that the defendants did not upon the entire evidence accept Hurlburt as a tenant otherwise than upon the implied condition that the terms of the lease should be finally agreed upon.

It is plain, as the presiding judge stated to the jury, "that the memorandum, upon the face of it, does not contain all that the lease was intended to contain." It is equally plain that there

was not at law or in equity an enforceable right or obligation created by or arising from the memorandum of agreement to bind or to benefit either party to the instrument. See *Roberts v. Lynn Ice Co.* 187 Mass. 402; *Bogigian v. Booklovers Library*, 193 Mass. 444; *Ridgway v. Wharton*, 6 H. L. Cas. 238.

The plaintiff does not rely upon proof or contend that the defendants and Hurlburt thereafter ever came to an agreement and understanding as to points and terms left undecided and unadopted at the execution of the agreement, but states, as his position, that "it is quite immaterial whether the contract of October 26 was legally binding upon the parties to it or not, and it was also immaterial whether equity would enforce specific performance of it or not. . . . The whole question is whether Matthews and Howe accepted Hurlburt as a person able, ready and willing to become their tenant on their terms."

It was entirely possible for the defendants to have said to the plaintiff, as he says in illustration of his position, "Mr. Woods, you have fulfilled your duty; you need not serve us longer; we accept Mr. Hurlburt as a person procured by you, able, ready and willing to become our tenant and to enter into such a lease as we see fit to draw." The reported facts do not warrant a finding of fact that the defendants accepted Hurlburt as a tenant, or that Hurlburt ever was able, ready and willing to become a tenant of the defendants under such a lease as the defendants might see fit to draw. To say that Hurlburt was ready and willing to become a tenant upon such terms as the defendants might draw, is to contradict the written "memorandum of agreement," and is to say that Hurlburt was without real voice in the apparent negotiations as to the terms of the proposed lease that followed the execution of the "memorandum of agreement" to the time when Hurlburt refused longer to treat with the defendants.

In relation to the continuance of the negotiations between the defendants and Hurlburt, the bill of exceptions states: "The plaintiff contended that no negotiations between the defendants and Hurlburt after October 26 were legally material or competent, and objected to the introduction of any evidence tending to show that such negotiations occurred after October 26. The court having overruled these objections of the plaintiff, the plaintiff did not dispute that certain negotiations between the defend-

ants and Hurlburt continued until November 12, when they were broken off by Hurlburt."

It would seem to be clear that readiness, willingness and ability to become a tenant upon the defendants' terms, in the absence of an express understanding otherwise, presupposes and implies that the terms which are to govern the rights of the parties are or are to be defined, and that so long as such terms are under discussion there can be in the nature of things neither a readiness nor willingness to become a tenant on the defendants' terms, or an acceptance of such a person as a tenant. *Fitzpatrick v. Gilson*, 176 Mass. 477. *Roche v. Smith*, 176 Mass. 595. *Cohen v. Ames*, 205 Mass. 186. *Goodnough v. Kinney*, 205 Mass. 203. *Clark v. Bonner*, 217 Mass. 201.

Moreover, if the "memorandum of agreement" be considered neither as a final nor as a preliminary contract, but is to be taken as a memorandum merely, that is to say, as admissions of the facts therein stated in connection with all the other evidence favorable to the plaintiff's contention, the entire evidence falls short and does not warrant a jury in finding that Hurlburt was able, ready and willing to become a tenant on the terms of the defendants, or that the defendants were in the position of having accepted him as such. Upon this issue a verdict should have been directed for the defendants.

It is unnecessary to consider the remaining exceptions taken to the admission or rejection of testimony, as well as to the rulings and refusals to rule of the presiding judge.

The exceptions are sustained and judgment is to be entered for the defendants under St. 1909, c. 236.

*So ordered.*

BENJAMIN P. MIGHILL & others vs. INHABITANTS OF ROWLEY & others.

Essex. March 23, 1916. — June 22, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

*Deed, Delivery. Cemetery Corporation. Municipal Corporations. Dedication.*

*It seems* that a deed, which was acknowledged five months after its date and was recorded eleven months after its acknowledgment, in the absence of other evidence of the time of its delivery, must be taken to have been delivered on the day of its acknowledgment.

In this Commonwealth a dedication of land to a public use does not take effect without an acceptance by the public.

An attempt or offer made by a burial ground corporation to dedicate a lot marked out upon its land by stakes or bounds for the erection of a soldiers' monument, which was followed five months later by a deed from the corporation to the town of all its land that was accepted by the town without knowledge of the attempt or offer of the corporation to dedicate the lot for the purpose named, such purpose not being known by the town or by the public until nearly forty years after the conveyance to the town, does not constitute a completed dedication, there having been no acceptance by the public.

LORING, J. The undisputed facts in this case were these: In 1871, the burial ground, which originally belonged to the First Parish and was the only burial ground in Rowley, was owned by the Burial Ground Corporation. At a meeting of the corporation held on July 24 of that year, it was voted to transfer all the real estate of the corporation to the town. It was further voted "that all money remaining after the bills are paid" should be placed in the hands of ten trustees, five of whom were to be the three selectmen, the town treasurer and the town clerk, while the remaining five were to be and were appointed by the meeting; and that "said trustees deposit all money in their possession . . . together with such amount as may at any time be added, in some savings bank, there to remain until the principal and interest . . . shall amount to eighteen hundred dollars, said fund shall then be expended in erecting a Soldiers' monument in Rowley." At a town meeting held on August 5, 1871, it was voted by the inhabitants of Rowley "to accept the doings of the Burial Ground Corporation whereby

they voted at a meeting held July 24, 1871, to transfer all the real estate of said corporation to the town of Rowley."

Pursuant to these votes a quitclaim deed was drawn up dated October 2, 1871, by which the Burial Ground Corporation conveyed to the defendant town "all our right title and interest in and to that lot of land in said Rowley known as the 'Rowley Burial Ground.'"  
In this deed there was a covenant against "incumbrances made or suffered by us [the grantor] except for the uses and purposes of burial grounds by the sale of lots and otherwise as appears by our records." This deed was acknowledged on March 4, 1872, and was recorded on February 6, 1873. Under these circumstances the date of delivery of the deed must be taken to have been the date of its acknowledgment, namely, on March 4, 1872.

"In February, 1872" the ten trustees created by the vote of the Burial Ground Corporation on July 24, 1871, met for the first time. An "organization of the trustees" was then effected and the "savings bank [was] designated wherein the money should be put." In 1913, the deposit having reached the sum named in the original vote, the trustees determined to erect a monument on a lot in the burial ground hereinafter described, and made a contract therefor. At a meeting of the inhabitants of the town in November of that year, it was voted not to allow the proposed Soldiers' monument to be erected in the burial ground and directing the board of selectmen, the town clerk and the town treasurer, who by virtue of their offices were members of the board of trustees "to vote and work" as members of the board of trustees "to have the proposed Soldiers' monument located on Rowley Common." Thereupon this bill was brought to enjoin the town, the cemetery commissioners of the town, the selectmen, the treasurer and the town clerk from interfering with the plaintiffs (who were the other members of the board of trustees) in erecting the proposed monument of the lot in the burial ground hereinafter described.

There were some facts, however, which were in dispute. They were testified to by George B. Blodgette, Esquire, a member of the bar. The judge who heard the case \* gave credit to Mr. Blodgette's testimony. We see no reason for coming to a different

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\* *Keating, J.*, who made a final decree granting the injunction prayed for. The defendants appealed.

conclusion. Mr. Blodgette's story was this: In September next after the July meeting of the Burial Ground Corporation (at which it was voted to transfer its real estate to the defendant town) a meeting of that corporation was held at which it was voted that a lot in the burial ground be laid out on the westerly side of the main avenue "to balance the minister's lot, and, as near as may be, of like size and like distance from the front fence and the main avenue as the ministers lot now is. When so laid out it shall remain forever for the use of our trustees chosen at our last meeting to erect and maintain thereon a soldiers monument as voted at our last meeting," and Mr. Blodgette, a Mr. Harris and one other were appointed a committee "to lay out such lot and mark the same with stakes at the corners." The next morning after this vote was passed this committee pursuant to that vote laid out a lot in the cemetery twenty-five feet square and marked the corners thereof with cedar stakes. These stakes remained at the corners of the lot until 1891, when Mr. Blodgette, at his own expense, caused stone posts to be substituted for the cedar stakes. The lot as then located remains thus marked. The records of the Burial Ground Corporation have been lost. Pursuant to a vote of the corporation to that effect, passed at the meeting held on July 24, 1871, the records of that meeting were entered upon the records of the defendant town next after the record of the vote of the defendant town accepting the action of the Burial Ground Corporation taken on July 24, 1871. But no record of the meeting held in September, 1871, was copied on the records of the town.

The defendant town took the burial lot as a volunteer. As a volunteer it took what its grantor (the Burial Ground Corporation) had. If there was a complete dedication at that time, the title of the town is subject to the rights given by the dedication.

This action on the part of the Burial Ground Corporation shows an attempt or offer on the part of the Burial Ground Corporation to dedicate the lot thus marked out as a lot for the erection of the proposed soldiers' monument. If that is enough to make a valid dedication, the plaintiffs have made out a case. But, if that is not enough, the plaintiffs have failed. There is nothing to warrant a finding that the town continued the attempt or offer of the Burial Ground Corporation to make the dedication.

It was said in *Abbott v. Cottage City*, 143 Mass. 521, 525, "The necessity of acceptance, in any form, of a gift to public uses has been a little over-insisted upon, perhaps, from a desire to bring the doctrine of dedication within some more general principle of law," and it also was said that "acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial." In addition it was there pointed out that in New Jersey no acceptance is necessary. But the subsequent case of *Attorney General v. Abbott*, 154 Mass. 323, was decided on the ground that an acceptance is necessary to complete a dedication. And in other jurisdictions the same rule generally obtains. See for example 9 Am. & Eng. Encyc. of Law, (2d ed.) 43 and cases there collected. We are of opinion that that must be taken to be the law of the Commonwealth.

In the case at bar there was no acceptance in the way in which a dedication is usually accepted. It was said in *Attorney General v. Abbott*, *ubi supra*, at page 328: "The acceptance is by the public at large, and the principal thing to show it is use by the public." In *Attorney General v. Onset Bay Grove Association*, 221 Mass. 342, 347, speaking of acceptance it was said: "The entrance of the public upon them and the enjoyment of the privileges understood to have been offered fully appears." In the case at bar there has been no acceptance in the usual way, namely, by user by the public.

Whether there can be an acceptance in some other way need not be considered. For example, it is not necessary to consider whether a vote by the trustees to accept would have been sufficient. No such vote was passed at the meeting of the trustees in February, 1872, when an organization of the board of trustees was effected and a savings bank was selected in which the funds of the trustees were to be deposited. So far as appears the board did not then know of the vote of the corporation or of the laying out of the lot in accordance with that vote. Two of the trustees (Blodgette and Harris) knew of the fact. But so far as appears they did not communicate the fact to the other members of the board. More than that, there is no evidence that any one but Blodgette and Harris and the person who testified under R. L. c. 175, § 66, to Harris's statements, ever knew of that fact until the dispute arose which gave rise to this suit. A copy of the vote



directing that the lot be laid out was not entered on the records of the town. So far as appears the attempt or offer to dedicate was not known by the public until nearly forty years after the conveyance to the town in March, 1872, and, when known, it was refused by the town.

Of the cases relied on by the plaintiffs there is one which perhaps ought to be referred to. In *Commissioners of Wyandotte County v. Presbyterian Church*, 30 Kans. 620, it was held that a dedication to church purposes was made out by proving that on a plat of the land laying out Wyandotte City and duly recorded in the registry of deeds, a certain lot of land was designated a "church lot," and, as matter of fact, was reserved for the respondent church. It was held that the dedication was complete. Of this it is to be remarked that the dedication of that lot was parcel of a plat of the whole city, and that the plat as a whole was recorded (as the law required) in the registry of deeds and was accepted by user. And in that case the public had knowledge of the dedication. In both respects that case did not go as far as we are asked to go in the case at bar.

We are of opinion that the title of the town is not affected by the attempted dedication of this lot to the erection of a soldiers' monument upon it.

The plaintiffs have made these additional contentions, namely: (1) "The committee had no authority to make such a deed as would bar the trustees from using the lot." (2) "It is certain that the committee could not and did not intend to convey the burial ground free of the rights of the trustees and if the deed did not express their intention it should be reformed. Equity treats that as done which ought to be done, and the decree restraining the defendants should stand." There are many difficulties in the way of maintaining these contentions. Neither one of them is set up in the bill and so neither one was tried out at the hearing. The deed in its present form has been acquiesced in for over forty years since it was delivered. The plaintiffs are strangers to the deed. Apart from a possible estoppel it is hard to see how the deed could have been drawn so as to create in the trustees (who are strangers to the deed) a right to use the lot laid out for the purpose of erecting and maintaining a soldiers' monument. But passing by these difficulties it is enough to say of these contentions

that neither one of them was made out on the evidence taken by the commissioner. The committee who conveyed the burial ground to the town was appointed before the vote to lay out the lot "for the use of our trustees . . . to erect and maintain thereon a soldiers' monument." When the vote to lay out the lot for a soldiers' monument was passed subsequently it was not suggested that the authority theretofore given to the committee to convey the cemetery should be affected by the dedication then attempted, nor that the matter of the attempted dedication should be dealt with in the deed. On the evidence the deed was within the authority of the committee and we so find. On the evidence too there was no mutual mistake in the deed. So far as appears neither the town nor the committee appointed by the town to act with the committee of the corporation in the transfer of the cemetery by the corporation to the town ever knew of the vote to lay out the lot for a soldiers' monument. On the evidence the committee of the burial ground corporation must be taken to have thought that a valid dedication had been made and that for this reason they did not undertake to deal with that matter in the deed. Doubtless the advisers of the corporation made a mistake in thinking that a valid dedication had been made. But that does not affect the validity of the deed nor give any one (much less one who is not a party to it) a right to have it reformed.

The findings and rulings in the former suit between the same parties were properly excluded. So far as appears that suit never went to a final decree. Under these circumstances other objections to this evidence need not be considered.

The decree appealed from must be reversed and a decree entered dismissing the bill.

*So ordered*

*A. P. White*, for the defendants.

*H. I. Bartlett*, for the plaintiffs.

## DOMINICK MURPHY'S (dependent's) CASE.

Hampden. November 30, 1915. — September 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, &amp; PIERCE, JJ.

*Workmen's Compensation Act, Dependency, Survival.*

Where a deceased employee at the time of an injury that resulted in his death had no family, and his mother, who was his only next of kin, was wholly dependent upon his earnings for support and filed a petition for compensation under St. 1911, c. 751, Part II, § 7, and where, after an award had been made by an arbitration committee from which an appeal to the Industrial Accident Board was pending, such dependent died, it was *held* that such dependent had no vested right to compensation under the statute which could pass to the representative of her estate, except the right that had accrued for compensation from the date of the injury to the time of her death, and that no person was in existence to whom an award under the statute to take effect upon her death could be made.

A weekly payment awarded to be made to a dependent under the workmen's compensation act comes to an end when the dependent dies.

It here was *intimated*, although not decided, that, where an employee dies from an injury within the workmen's compensation act, leaving a widow and children by such widow under eighteen years of age, and the widow subsequently dies while a petition by her for compensation under the act is pending or after an award has been made upon it, an order directing payments to be made to the widow may be reviewed by the Industrial Accident Board under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, and a new award may be made to such minor children under St. 1911, c. 751, Part II, § 7, of payments for the period subsequent to the death of the widow.

LORING, J. The appeal in this case brings to us the question of the character of the right to compensation (under the workmen's compensation act) given to a dependent of an employee who dies of an injury within the act. In the case at bar, the death of the dependent took place while the case was pending on appeal from an award of the arbitration committee and before the case was heard by the Industrial Accident Board. An administrator intervened, and the board directed that \$9.75 a week for three hundred weeks should be paid to the administrator to be paid by him to the next of kin of the deceased dependent. This was confirmed by the decree of the Superior Court.\*

The deceased employee lived with his mother who for some

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\* Made by *Aiken*, C. J. The insurer and the employer appealed.

years had been wholly incapacitated by the fatal disease of which she died. The other members of the family were a daughter, who carried on the household, doing the household work with her own hands, a brother, and an adopted daughter, who was a minor. The brother and the adopted daughter were sickly and contributed to the household expenses enough but no more than enough to pay for what they received from it. The deceased had another brother who did not live at home and made no contribution to the maintenance of the family. The board found that the mother was wholly dependent upon the deceased, and that finding was warranted by the evidence. The board also found that the family was the family of the mother, not of the son. That finding also was warranted by the evidence. It follows that the only person entitled to recover was his mother, she being the deceased's only next of kin. *Kelley's Case*, 222 Mass. 538.

There is no provision in the workmen's compensation act dealing expressly with the question which this case presents. Whether the sum which a dependent is entitled to upon the death of an employee is a vested interest or ceases upon the death of the dependent, is a question which must be decided by the general provisions of the act interpreted in the light of the object which the act was passed to effect.

The act recognizes that a personal injury suffered by an employee arising out of and in the course of his employment is an incident of the business in which he is employed. In consequence of that the act provides that as a matter of justice the resulting burden should be borne by the business without regard to the question of fault on the part of the employer or of the employee. The only exception to this is where the injury is caused by the serious and wilful misconduct of the employee. In that case no compensation is given.

In carrying out this object it was provided that, where death results from an injury within the act, the insurer shall pay to the dependent or dependents of the employee a weekly payment based upon the average weekly wages of the deceased employee. Dependents are defined by the act to be members of the employee's family or next of kin who were wholly or partly dependent for support upon the earnings of the employee at the time of the injury.

In the case at bar, as we have said, the original petitioner, being the mother of the employee, was his sole next of kin and under the findings of the Industrial Accident Board was wholly dependent upon the deceased for her support. The act in effect provides that as a measure of justice, the mother (the sole next of kin of the deceased in the case at bar) should receive, in lieu of the help she got from the wages of the deceased while he lived, a payment for three hundred weeks based upon the amount of his wages. When she died the occasion for making compensation to her (which the act as matter of justice required should be made) came to an end.

To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed.

The opposite result has been reached in England and in Ohio. But both those decisions were founded on provisions of the acts there in question which were not like the provisions of our workmen's compensation act. The decision in *United Collieries, Ltd. v. Simpson*, [1909] A. C. 383, was based upon the provision of the English act, that in case the employee was killed a lump sum should be paid to those dependent upon him. St. 6 Edw. VII, c. 58, § 1, cl. 1, and schd. 1, § 1, and (a) (i). The decision in Ohio (*State v. Industrial Commission of Ohio*, 92 Ohio St. 434, 436, 437) was founded on a provision of the act that in the case of persons wholly dependent "the payment shall be sixty-six and two-thirds per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury." This provision, construed in the light of the report of the commissioners, was held by the court to mean what by a literal interpretation of its words it provided.

For these reasons we are of opinion, that although there is no

express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies. It follows that the decree appealed from must be modified.

It has been suggested that this case should be sent back in order that a motion might be made to the board under the supervisory power given it by the act (St. 1911, c. 751, Part III, § 12, amended by St. 1914, c. 708, § 11) for an award to some one other than the deceased mother. But in exercising this supervisory power the board is limited in reviewing an order for a weekly payment to making one "subject to the provisions of this act." In the case at bar the deceased had no family. His mother (since deceased) was his only next of kin "at the time of the injury," when by the terms of the act (St. 1911, c. 751, Part V, § 2) the persons dependent upon him, in the case at bar his next of kin, are to be ascertained. The act provides that in case the employee dies of his injury, compensation shall be awarded to those persons who were in fact his next of kin or members of his family at the time of the injury and who in fact were dependent upon him for support at that time. It does not authorize an award of compensation to be made, for example, to persons who would have been his next of kin if his sole next of kin had been dead, and who were not in fact dependent upon him but might have been dependent upon him had it been that the next of kin who was dependent upon him had died. It follows that in the case at bar no order in favor of any one else could be made now.

There may be cases where on the subsequent death of the dependent it would be proper to send the case back for an opportunity to make a motion under St. 1911, c. 751, Part II, § 7, for a review of the order for compensation. The case where an employee dies of an injury within the act leaving a widow and children by such widow under eighteen years of age would seem to be such a case. It is provided by St. 1911, c. 751, Part II, § 7, as amended by St. 1914, c. 708, § 3, that in such a case the whole compensation shall be paid to the mother to the exclusion of the children. *McNicol's Case*, 215 Mass. 497. In that case the minor children as well as the widow are next of kin to the deceased. Without doubt the reason why the minor children in that case are not included among the persons to whom the com-

pensation can be awarded is because it is assumed that the compensation paid to the widow will be used by her in the support of such minor children, and that as a matter of administrative justice it is better to pay the whole to the widow than to divide the compensation between the widow and such minor children. On the subsequent death of the widow (in case the widow afterwards dies) this reason ceases to exist. In such a case unless the order directing payment to be made to the widow can be reviewed, a gross injustice would be done to such minor children. And this injustice is intensified by the provision of St. 1911, c. 751, Part II, § 7, that where there is no surviving dependent such minor children are conclusively presumed to have been dependent upon the deceased employee. Upon this point it is not necessary now to come to a final decision.

The result is that the dependent mother was entitled to compensation from the date of the injury to the date of her death. The decree must be modified accordingly and so modified is affirmed.

*So ordered.*

The case was submitted on briefs at the sitting of the court in November, 1915, and afterwards was submitted on briefs to all the justices except *Carroll, J.*

*A. L. Green & F. F. Bennett*, for the insurer and the employer.

*T. J. O'Connor*, for the administrator of the estate of the dependent mother.

## COMMONWEALTH vs. CHARLES SVARNAS.

Essex. June 22, 1916. — September 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, &amp; CARROLL, JJ.

*Police, District and Municipal Courts.*

Under R. L. c. 160, §§ 11, 36; c. 161, § 5, an assistant clerk of a district court has authority to receive a complaint addressed to the court and to administer the oath to the complainant.

COMPLAINT, received and sworn to in the District Court of Southern Essex on May 24, 1916, for the alleged violation of a regulation of the board of health of the city of Lynn.

On appeal to the Superior Court the defendant was tried before *McLaughlin, J.* The defendant renewed a motion, which had been denied in the district court, that the complaint be quashed "for the reason that it was received by and sworn to before the assistant clerk of said court, at a time when said court was not in session, and said assistant clerk had no warrant or authority in law so to receive said complaint or to take the oath of the complainant thereto."

The judge denied the motion, and upon the defendant's plea of guilty imposed a fine of \$5. At the request of the defendant the judge stayed sentence under R. L. c. 220, § 3, and reported the case for determination by this court upon the question raised by the motion to quash.

The case was submitted on briefs.

*H. R. Hurley*, for the defendant.

*L. S. Cox*, District Attorney, for the Commonwealth.

RUGG, C. J. The only question presented on this record is whether an assistant clerk of a district court has authority to receive a complaint addressed to the court and to administer the oath thereon.

He has such authority. R. L. c. 161, § 5. *Commonwealth v. Wetherbee*, 153 Mass. 159. He holds an office created by law. R. L. c. 160, §§ 11, 36.

*Sentence to stand.*



ATTORNEY GENERAL *vs.* SUFFOLK COUNTY APPORTIONMENT  
COMMISSIONERS.

HENRY L. HIGGINSON & others *vs.* SAME.

FRANK N. NAY & others *vs.* SAME.

TILTON S. BELL *vs.* SAME.

HERMAN HORMEL *vs.* SAME.

GEORGE F. WHIPPLE & others *vs.* SAME.

PETITIONS FOR WRITS OF MANDAMUS.

JAMES DONOVAN *vs.* SAME.

W. PRENTISS PARKER & others *vs.* SAME.

DAVID T. MONTAGUE & others *vs.* SAME.

GEORGE F. WHIPPLE & others *vs.* SAME.

PETITIONS FOR WRITS OF CERTIORARI.

GEORGE E. BROCK *vs.* SAME.

BILL IN EQUITY.

Suffolk. September 5, 1916. — September 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CARROLL, JJ.

*Constitutional Law, Apportionment of representation. House of Representatives.  
Suffolk County Apportionment Commissioners. Mandamus. Attorney  
General.*

On a petition by the Attorney General for a writ of mandamus addressed to the Suffolk County apportionment commissioners elected under St. 1913, c. 835, § 390, declaring an apportionment of representation in the legislative districts in that county attempted to be made by the respondents to be void as not in conformity with the Constitution and ordering them to proceed "as soon as may be" to divide the county of Suffolk into representative districts so as to apportion the number of representatives assigned to that county "equally, as nearly as may be, according to the relative number of legal voters" in the several districts, a clause in the reservation for determination of the case by this court, stating that, if the question whether the respondents acted in good faith was material, this court might draw conclusions from the apportionment itself, was disregarded by this court, because this court has no power to decide facts in a proceeding at law and the question of good faith, if material, was one of fact, and it was held that the case must be considered by the court on the footing that the good faith of the commissioners was presumed.

By art. 21 of the Amendments to the Constitution, which provides that a "board of special commissioners . . . shall, on the first Tuesday of August next after each assignment of representatives to each county . . . proceed, as soon as may be, to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly

as may be, according to the relative number of legal voters in the several districts of each county," the principle of practical equality of representation among all the voters of the Commonwealth is established.

The Suffolk County apportionment commissioners elected under St. 1913, c. 835, § 390, in 1915 and in every tenth year thereafter, who are directed to "so divide said county into representative districts of contiguous territory as to apportion the representation of said county, as nearly as may be, according to the number of voters in the several districts," must perform their duties as directed by art. 21 of the Amendments to the Constitution; and, where it is manifest from the inspection of an apportionment attempted to be made by them that there is grave, unnecessary and unreasonable inequality in the representation assigned by them to different districts, the Constitution has been violated and their attempted action is void.

Among the inequalities, which were *held* to have been sufficient to make the attempted apportionment void, was the apportioning to one district of two representatives for 3,913 voters and in another district giving only one representative for 6,182 voters. Another inequality was apportioning one representative to a district with almost 5,000 voters and apportioning three representatives to another district with about 6,000 voters. There were many other similar disparities showing gross and palpable inequalities extending to a considerable number of the districts.

A petition for a writ of mandamus addressed to the Suffolk County apportionment commissioners, who had filed a report purporting to make an apportionment of representation in the legislative districts in that county which was void as in violation of art. 21 of the Amendments to the Constitution, commanding them to proceed with the performance of their duties under St. 1913, c. 835, in accordance with the provisions of the Constitution, affords the appropriate form of relief and is a remedy expressly provided by § 502 of the statute named for enforcing the provisions of that chapter.

The remedy by mandamus described above is available to a citizen and voter interested in the execution of the laws.

In the case above described it was *held*, that, the public interests being involved, the Attorney General might institute and maintain a petition for a writ of mandamus to vindicate the public right.

In the case above described it was *held* that in issuing the writ of mandamus no specific time need be fixed for the completion by the commissioners of their work, it being assumed that they would be actuated by a consciousness of serious public duty with the obligations thereby entailed.

RUGG, C. J. These proceedings are brought to test the legality of the division into representative districts of the fifty-four representatives to the General Court apportioned to Suffolk County by St. 1916, c. 270, § 24. This division is required to be made by a board of nine commissioners elected by the voters of Suffolk County. St. 1913, c. 835, § 390, provides as follows:

"At the annual State election in the year nineteen hundred and fifteen, and in every tenth year thereafter, nine commissioners shall be elected for the county of Suffolk, for the performance of the duties

hereinafter specified. Five of said commissioners shall be residents of and voters in the city of Boston and shall be elected by the voters of that city; two shall be residents of and voters in the city of Chelsea and shall be elected by the voters of that city; one shall be a resident of and a voter in the town of Winthrop and shall be elected by the voters of that town; and one shall be a resident of and a voter in the town of Revere and shall be elected by the voters of that town. Said commissioners shall hold office for one year from the first Wednesday of January next after their election. At their first meeting, they shall organize by choosing a chairman, who shall be one of their number, and a clerk. The city of Boston shall provide them with a suitable office and room for hearings and shall allow and pay to them for compensation a sum not exceeding five hundred dollars each, said sum to be determined by the Governor and Council, and a further sum of not more than seven hundred dollars for clerk hire, stationery and incidental expenses.

"The said commissioners shall, on the first Tuesday of August next after the Secretary of the Commonwealth shall have certified to them the number of representatives to which the county of Suffolk may be entitled, as determined by the General Court, assemble in the city of Boston, and, as soon as may be, shall so divide said county into representative districts of contiguous territory as to apportion the representation of said county, as nearly as may be, according to the number of voters in the several districts. Such districts shall be so formed that no ward of a city and no town shall be divided, and no district shall be so formed that it shall be entitled to elect more than three representatives. . . ."

One of the commissioners has deceased and the remaining eight are the respondents in each of the petitions and the defendants in the bill in equity in which the Secretary of the Commonwealth also is joined as a defendant.

A report has been filed by the commissioners. The division into representative districts therein set forth is assailed on the ground that it has not been made in accordance with the requirement of the Constitution. The pertinent provision of the Constitution is in art. 21 of the Amendments, and is as follows:

"A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the Secretary of the Commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters; and in each city, said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of representatives for the periods between the taking of the census.

"The House of Representatives shall consist of two hundred and forty members, which shall be apportioned by the Legislature, at its first session after the return of each enumeration as aforesaid, to the several counties of the Commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by the next preceding special enumeration; and the town of Cohasset, in the county of Norfolk, shall, for this purpose, as well as in the formation of districts, as hereinafter provided, be considered a part of the county of Plymouth; and it shall be the duty of the Secretary of the Commonwealth, to certify, as soon as may be after it is determined by the Legislature, the number of representatives to which each county shall be entitled, to the board authorized to divide each county into representative districts. The mayor and aldermen of the city of Boston, the county commissioners of other counties than Suffolk, — or in lieu of the mayor and aldermen of the city of Boston, or of the county commissioners in each county other than Suffolk, such board of special commissioners in each county, to be elected by the people of the county, or of the towns therein, as may for that purpose be provided by law, — shall, on the first Tuesday of August next after each assignment of representatives to each county, assemble at a shire town of their respective counties, and proceed, as soon as may be, to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the relative number of legal voters in the several districts of each county; and such districts shall be so formed that no town or ward of a city shall be divided therefor, nor shall any district be made which shall be entitled to elect more than three representatives."

The court has jurisdiction to determine whether the commissioners in making the division have violated the requirements of this article of amendment to the Constitution. Scarcely any right more nearly relates to the liberty of the citizen and the independence and the equality of the freeman in a republic than the method and conditions of his voting and the efficacy of his ballot, when cast, for representatives in the legislative department of government. It was said in the *Opinion of the Justices*, 10 Gray, 613, at page 615, "Nothing can more deeply concern the freedom, stability, the harmony and success of a representative republican government, nothing more directly affect the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted." The right to vote is a fundamental personal and political right. The equal right of all qualified to elect officers is one of the securities of the Declaration of Rights, arts. 1-9. Unlawful interference with the right to vote, whether on the

part of public officers or private persons, is a private wrong for which the law affords a remedy, although it may also have significant political results. *Capen v. Foster*, 12 Pick. 485. *Larned v. Wheeler*, 140 Mass. 390. The right of every voter to participate in the election of representatives to the General Court "equally, as nearly as may be," with all his fellows is secured by the twenty-first amendment to the Constitution. An act of the Legislature limiting or in any way interfering with this right would be invalid. See *Kinneen v. Wells*, 144 Mass. 497. County commissioners or special commissioners in performing the duties reposed in them by the Constitution stand on no higher ground than does the Legislature in performing its constitutional functions. While the right to vote for members of the Legislature is in a sense a political right, it is also a precious personal right. The duty of dividing the authorized number of representatives among the legal voters is in a sense political, yet so far as it affects contrary to the Constitution the rights of citizens, such an infringement is cognizable in the courts when presented in an appropriate proceeding between proper parties. On principle the conclusion is irresistible that the court has jurisdiction to redress the wrongs here alleged.

The decisions of other States are numerous and harmonious to the same effect.\*

The circumstance that political considerations may be connected with rights affords no justification to courts for refusal to adjudicate causes rightly pending before them. Such a controversy, even though political in many of its aspects, is of judicial

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\* *Baird v. Supervisors of Kings County*, 138 N. Y. 95. *State v. Cunningham*, 81 Wis. 440. *State v. Cunningham*, 83 Wis. 90. *Supervisors of Houghton County v. Secretary of State*, 92 Mich. 638. *Giddings v. Secretary of State*, 93 Mich. 1. *Williams v. Secretary of State*, 145 Mich. 447. *Stevens v. Secretary of State*, 181 Mich. 199. *Parker v. State*, 133 Ind. 178. *Denney v. State*, 144 Ind. 503. *Brooks v. State*, 162 Ind. 568. *Ragland v. Anderson*, 125 Ky. 141. *State v. Wrightson*, 27 Vroom, 126. *Smith v. Baker*, 45 Vroom, 591. *People v. Supervisors of Adams County*, 185 Ill. 288, 292. *State v. Hitchcock*, 241 Mo. 433. *Prouty v. Stoper*, 11 Kans. 235, 252. *State v. Weatherill*, 125 Minn. 336. *State v. Dudley*, 1 Ohio St. 437, 441. *Murphy v. Eney*, 77 Md. 80, 84. *Commonwealth v. Crow*, 218 Penn. St. 234. *Ballentine v. Willey*, 3 Idaho, 496, 506. *Harrison v. Ballot Commissioners*, 45 West Va. 179. *People v. Canaday*, 73 N. C. 198. The case of *Wise v. Bigger*, 79 Va. 269, sometimes cited as doubting the proposition, is not contrary, for no question of conformity of apportionment to the Constitution there was involved.

cognizance. *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 84. *Stone v. Charlestown*, 114 Mass. 214. *McPherson v. Secretary of State*, 146 U. S. 1, 23.

There is nothing at variance with this conclusion in *Opinion of the Justices*, 10 Gray, 613. That discussion was directed wholly to the powers of the Legislature to correct alleged errors in a division of representatives. The jurisdiction of the courts was not involved in any of the questions submitted to the justices. The words of the justices must be read as applicable to the subject under consideration and not treated as of such general purport as to cover instances not then before their minds. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 545. But it appears from the report of the election case of *Lothrop, petitioner*, Mass. Election Cases, (Loring & Russell's ed.) 49, 54, in reference to which that opinion was given, that the jurisdiction of the Supreme Judicial Court to correct errors in such a case was assumed by the legislative committee. Moreover, although the jurisdiction of the court was not pertinent to answers to the inquiries of the House of Representatives, it there was said in substance only that "the doings and returns [of the county commissioners, of the mayor and aldermen of Boston or of special commissioners] made conformably to the article of amendment" were conclusive. Nothing was intimated as to "doings and returns" manifestly contrary to the terms of that article of amendment to the Constitution.

The cases come before us on a "report and reservation" made by a single justice.\* Against the objection of the respondents a clause was inserted to the effect that, "If the question whether the respondents acted in good faith is material, the court, in any of the said proceedings except the petitions for certiorari, may draw conclusions from the apportionment itself, notwithstanding the failure of the petitioners to join issue on the allegations of good faith contained in the answers." This clause in the reservation must be disregarded. If good faith is material, it is a fact and must be found by a tribunal authorized to try and decide facts. This court has no power to decide facts in a proceeding at law. *Electric Welding Co. v. Prince*, 200 Mass. 386. *Foster v. Boston Elevated Railway*, 214 Mass. 61. The cases must be considered on the footing that the good faith of the special commissioners is presumed.

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\* Crosby, J.

The particular ground of attack is that the report of the special commissioners shows that they have failed "to divide" the county of Suffolk "into representative districts . . . so as to apportion the representation assigned to" that county "equally, as nearly as may be, according to the relative number of legal voters in the several districts." Article 21 of the Amendments to the Constitution. The great principle established by this amendment is equality of representation among all the voters of the Commonwealth. That is a fundamental principle of representative government. It is pre-eminently so in a State whose Declaration of Rights declares that "all men are born free and equal," and in a nation whose Declaration of Independence asserts that "all men are created equal." There can be no equality among citizens if the vote of one counts for considerably more than that of another in electing public officers. The true spirit and meaning of the Constitution is that each voter has an equal voice in the enactment of laws and in the election of officers of the State. Such equality must be secured in all laws for the choosing of representatives in the General Court or the Constitution is violated. One voter or one group of voters cannot be given a greatly preponderating power in shaping legislation through the election of a representative or representatives by a disproportionately small number of voters as compared with another group, and still the equality between voters secured by the Constitution be preserved. Inequality of representation apparent on the face of the apportionment offends against this constitutional provision, a provision of the very essence of any conception of equality among voters, each of whom is the peer in political right of every other.

Absolute equality of representation is not required by the article of amendment. There are other inflexible conditions of the apportionment which must be observed and which prevent exactness of equality. The representative districts must be within the several counties, they cannot be formed by the division of towns or wards of cities, they must be made up of contiguous territory, and no district can be given more than three representatives. But within these limitations there must be the nearest approximation to equality of representations which is reasonably practicable. The words of the amendment, that the representatives must be apportioned upon the basis of equality "as nearly

as may be," does not mean mathematical accuracy of equality. They do not aptly express that idea. The words import some flexibility in the division. Something is left to the sound judgment of the body charged with making the apportionment and division.

But the rule established by the Constitution is plain. The total number of two hundred and forty members of the House of Representatives must first be divided by the Legislature between the several counties "equally, as nearly as may be, according to their relative numbers of legal voters," with the exception of the town of Cohasset, which, although in the county of Norfolk, is for this purpose to be treated as a part of the county of Plymouth. The commissioners are then to make the division of the several counties into representative districts. In doing this five general rules are laid down by the amendment: 1. They must proceed within their respective counties, with the single exception of Cohasset. 2. No town or ward of a city can be divided. 3. The territory of each district must be contiguous. 4. No more than three representatives can be assigned to one district. 5. The representatives must be divided so that "as nearly as may be" the same number of voters shall in every instance be entitled to an equal representation in the House. These five mandates all stand on the same footing. One is no more imperative than another. The only guide for determining equality to which resort may be had under the Constitution is the "numbers of legal voters, as ascertained by the next preceding special enumeration," provided for by the first paragraph of the twenty-first article of amendment. That article says that that enumeration "shall determine the apportionment of representatives for the periods between the taking of the census." It would be hard to conceive words expressive of a more positive and unmistakable command. Its fundamental idea is that the special enumeration of legal voters alone shall be considered in making the apportionment and division. *Opinion of the Justices*, 142 Mass. 601, 604. *Opinion of the Justices*, 157 Mass. 595.

In the performance of the duty of providing equal representation within any county, the commissioners naturally, if not necessarily, would divide the whole number of legal voters in the county by the number of representatives allotted to that county.



Thus the unit of representation or the ratio between the voters and the representatives is found. Upon this unit or ratio the representative districts must be formed, each having, as nearly as may be, in view of the other mandatory requirements of the amendment, a number of legal voters equal to the unit or ratio thus found for one representative, or twice that number for two representatives, or three times that number for three representatives. Equality in the ratio between voters and representatives amongst the several districts is the command of the people as expressed in the Constitution. The commissioners are bound by the most sacred considerations of official duty to follow this plain command of the Constitution in forming the districts and in dividing between the districts the number of representatives. This is in substance the statement of the duty of the officers charged with the duty of forming representative districts and dividing among them the representatives set out in *Opinion of the Justices*, 10 Gray, 613, 619. If each board of officers in each of the counties follows this plain rule of the Constitution, then there will be secured to every voter throughout the State that equality of influence in shaping legislation which it is the indubitable design of the Constitution to maintain.

It is not every inequality between the several representative districts which will be fatal in a constitutional sense. It is inevitable that there must be in the several districts some variation from the unit of representation found by dividing the legal voters of the county by the number of representatives apportioned to that county. These variations may be augmented where there are numerous towns and cities with different numbers of wards and of legal voters. The difficulties may be considerable. There is abundant room for the exercise of reason and judgment in the formation of the districts and in the disposition to be made of the excess or deficiency of the number of voters as compared with the unit of representation or ratio between voters and representatives, which unavoidably must be found even with the most conscientious efforts. Many questions may arise which cannot be solved by computation and which may require the exercise of a high degree of sagacity. A wide discretion must of necessity be exercised by the commissioners. Doubtless some apparent inequalities, not amounting to a gross disparity, might be ex-

plained by reference to the complexities arising from town and ward lines and the different numbers of legal voters found in each. Not every deviation from exact uniformity in the ratio between legal voters and representatives would justify resort to the courts or warrant the conclusion that the Constitution had been ignored. The court would be slow to set aside an apportionment which appeared by any exercise of sound discretion to have followed the requirements of the Constitution and to be an approximation to equality. But where it is manifest on its face from a mere inspection of the apportionment that the Constitution has been transgressed, then the division made by the commissioners cannot stand. When fair minded men from an examination of the apportionment and division can entertain no reasonable doubt that there is a grave, unnecessary and unreasonable inequality between different districts, the Constitution has been violated and it is the duty of the court so to declare. *Baird v. Supervisors of Kings County*, 138 N. Y. 95, 114.

Tried by this test there can be no uncertainty in the result to be reached in the case at bar. The inequality is obvious and indisputable. It is momentous, excessive and might have been avoided. No argument is needed. It is demonstrated by a statement of the facts. The unit of representation or ratio of legal voters to representatives in Suffolk County obtained by dividing its 175,890 legal voters by the 54 representatives is 3,257 $\frac{1}{2}$ , and may be regarded for convenience as 3,258. Where a less number are given one representative the inequality increases their voting power, and where a larger number are given one representative the inequality diminishes their voting power in the House of Representatives. The commissioners divided Boston (which is by far the largest part of Suffolk County) into representative districts by adopting as such districts the several wards, except that they combined wards 19 and 21 into one district. Therefore no such complexity arises as might exist in the combination of towns or of towns with one or more wards of a city. The most glaring inequality is between District 26, with 3,913 legal voters, to which two representatives are given, or one for 1,957 voters, and District 16, with 6,182 legal voters, to which one representative is given. A voter in District 26 thus would have more than three times the voting power of a voter in District 16

in the election of representatives to the General Court. The variation from the unit of legal voters for one representative as found above is from 1,301 below in District 26 to 2,924 above in District 16. The disparity between the two is more than three to one. Any attempt to conform to the equality of representation required by the Constitution as to these two districts would have reversed the apportionment and given two representatives to District 16 and one to District 26. Districts 24 and 25 contain respectively 4,842 and 4,282 voters, and each is given one representative, while Districts 9 and 10, containing respectively 6,151 and 6,056 voters, are each given three representatives, being one representative to 2,051 and 2,018 voters respectively, or a disparity of more than two to one in each instance. Districts 14, 17, 18, 20 and 22, with voters varying from 6,105 to 5,666, but no one of them equalling in number the voters of District 16, are each given two representatives, a disparity of more than two to one as compared with District 16, which is given only one representative. The two largest districts, 7 and 19, containing respectively 10,714 and 11,571 voters, are given two representatives each, while Districts 5, 9 and 10 each considerably smaller and containing respectively 7,946, 6,151 and 6,056, each are given three representatives. Three representatives to each of the two largest districts would have given in the smaller of the two one representative to 3,571 legal voters or 313 more than the unit, while in the largest of those to which three have been given there is one representative for only 2,649 or 611 less than the unit, and in the smallest of those to which three have been given there is one representative for 2,019 voters or 1,239 below the unit of representation. Plainly any effort at an approximation to equality would have given three representatives to each of the two largest districts. District 6, with 8,618 voters is given two representatives while, as just pointed out, three districts with a less number of voters are given three representatives. Three representatives to District 6 would have been one for 2,873 voters or only 385 below the unit, a very appreciably less number below the unit than appears in Districts 3, 4, 5, 9, 10, 20, 22 and 26. Three representatives have been assigned to District 9 and also to District 10. But the population of each, being 6,151 and 6,056 respectively shows that, if given two representatives, they still would have a

larger representation according to legal voters than the correct ratio.

These references to the report of the commissioners show such numerous and flagrant deviations from equality of representation that it is impossible to reconcile the apportionment with the constitutional requirement. The inequality is gross and palpable and extends to a considerable number of districts. Even a cursory examination of the report would show that a far more equal apportionment might have been made by following the plain mandate of the Constitution.

The conclusion is irresistible that the constitutional requirement of equality has been ignored. It is not open to reasonable controversy. Tried by the standard of equality of representation fixed by the Constitution, the result reached by the commissioners appears arbitrary. It has been urged that the commissioners have been hampered by ward lines. But they are not responsible for the ward lines. These have been established by independent authority and the commissioners must accept them as they find them. *Fitzgerald v. Mayor of Boston*, 220 Mass. 503. They must make a determination of the nearest practicable approach to equality of representation on the existing ward lines. The report of the commissioners, being plainly not conformable to the Constitution, has no validity.

It has been argued ably in behalf of the commissioners that the grave results which will flow from declaring the report null and void should cause hesitation in sustaining the petitioners' contentions. These considerations may be entitled to weight in determining whether a constitutional mandate has been violated. But when once it has become evident beyond a doubt that the Constitution has been infringed and that rights indisputably secured by it have been trampled, then there is no other way but to maintain the Constitution when relief is promptly sought. No consequence of adherence to the Constitution can be so evil as a failure to abide by its terms under the circumstances here disclosed.

Mandamus affords the appropriate form of relief. It is the remedy to which resort usually is had to set aside the illegal performance of duty and to compel the performance of duty according to law, by public officers entrusted with discretionary,

administrative or political functions when it is their duty to act. *Flanders v. Roberts*, 182 Mass. 524, 529. *Cox v. Segee*, 206 Mass. 380. *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 505. *Attorney General v. Boston*, 123 Mass. 460, 479. *Rea v. Aldermen of Everett*, 217 Mass. 427. *Luce v. Board of Examiners of Dukes County*, 153 Mass. 108. *Keough v. Aldermen of Holyoke*, 156 Mass. 403. *Cheney v. Barker*, 198 Mass. 356, 367. *People v. Ammenwerth*, 197 N. Y. 340. It is a remedy expressly provided by St. 1913, c. 835, § 502, for the enforcement of the provisions of the very act, under § 390 of which these commissioners were elected and according to which they must perform their duties. It has been the remedy granted in most of the cases cited earlier in this opinion as to the jurisdiction of the court. It is available in proper cases to an individual who is a citizen and voter and thus interested in the execution of the laws. *Brewster v. Sherman*, 195 Mass. 222.

Where the public interests are involved, the Attorney General may institute a petition for mandamus to vindicate the public right. *Attorney General v. City Council of Lawrence*, 111 Mass. 90. *Attorney General v. Boston*, 123 Mass. 460, 478. *Wellington, petitioner*, 16 Pick. 87, 105. No discussion is needed to show that the composition of the House of Representatives, according to the requirement of the Constitution, is a matter of public concern.

The commissioners are still in office. By the express terms of § 390 of St. 1913, c. 835, "Said commissioners shall hold office for one year from the first Wednesday of January next after their election." These commissioners were elected in 1915. The report which they have already filed is a nullity. Therefore they have not performed their duty and are not *functi officio*. It is now their plain duty to make a division and apportionment according to the Constitution. They are amenable to the court to this end.

It has been urged that a special mandate be issued to the commissioners fixing a time within which a new and legal apportionment shall be filed. Doubtless the public exigency is great. The nomination and election of representatives to the Legislature from Suffolk County during the current year apparently can be accomplished only by the enactment of a special statute, for the time provided by the existing law for filing nomination papers expired before the present cases were entered in this court. St. 1913, c. 835, §§ 118, 120. A special statute to bring about this

result can be enacted only by a special session of the Legislature. But it cannot be doubted that the commissioners will proceed with all speed to the performance of their duties in the light of the rules here laid down. This must be presumed in their favor. They must at present be familiar with all the facts which will enable them forthwith to act in conformity to the Constitution and laws. No specific time need now be fixed for the completion of their work. It must be assumed that they will be actuated by a solemn consciousness of serious public duty, with all the obligations thereby entailed.

Since the several individual petitioners for writs of mandamus appear equally entitled to relief, and since only one order need be made, the remedy may be granted in the petition of the Attorney General for mandamus. Let the entry be in that cause in substance, that the division and apportionment of the county of Suffolk into representative districts already made and filed by the commissioners is void as not in conformity to the Constitution, and that the commissioners must proceed "as soon as may be" to divide the county of Suffolk into representative districts so as to apportion the number of representatives assigned to that county "equally, as nearly as may be, according to the relative number of legal voters" in the several districts, and otherwise in conformity to the Constitution and to art. 21 of the Amendments to the Constitution, and to make due report thereof as required by said article. Any party may apply for further direction and relief. In each of the other petitions for mandamus the entry may be, demurrer overruled and petition dismissed without prejudice for the reason that adequate relief is granted in the petition brought by the Attorney General. In the petitions for certiorari the entry may be, petitions dismissed. The bill in equity may be dismissed.

*So ordered.*

*W. A. Buie, (T. J. Ahern with him,) for the commissioners.*

*W. H. Hitchcock, Assistant Attorney General, (C. W. Mulcahy with him,) for the Attorney General.*

*N. Matthews, (F. G. Goodale & J. E. Searle with him,) for the individual petitioners and the plaintiff in the suit in equity.*



# INDEX.

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## ABORTION.

A woman, whose death has been caused by a criminal operation to procure a miscarriage, is not an accomplice to the crime although she voluntarily went to the person who performed the operation and paid him for doing it, and, at the trial of an indictment for the crime under R. L. c. 212, § 15, the defendant may be convicted upon evidence contained in a dying declaration of the woman introduced under R. L. c. 175, § 65, without the introduction of evidence in corroboration of her statements. *Commonwealth v. Turner*, 229.

Evidence which was held to warrant a verdict of guilty in such case. *Ibid.*

At the trial of an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, whose death resulted, a dying declaration made by the woman, offered in evidence under R. L. c. 175, § 65, is not rendered inadmissible by the fact that, at its close, with her right hand held raised, supported by one of her attending physicians, she repeated after another physician the words, "I say this realizing I am about to die and this is true, so help me God." *Ibid.*

Contradictory statements, in a dying declaration by a woman under such circumstances, as to the name of the person responsible for her pregnancy affect the weight only and not the competency or admissibility of the declaration as evidence. *Ibid.*

At such trial, the testimony of a nurse, at whose house the deceased went after the illegal operation, who was called by the Commonwealth, was held to be admissible although in direct examination she stated that a doctor who called upon the woman was not the defendant and did not look like him. *Ibid.*

At the trial above described, the jury were instructed that they should disregard all of the nurse's testimony unless they were satisfied beyond a reasonable doubt of the identity of the defendant as the doctor who called at her house when the woman was there; and a motion to have her entire testimony stricken out was held to have been denied rightly. *Ibid.*

In this case it was held that under the circumstances the discretion of the presiding judge as to permitting the Commonwealth to cross-examine or lead its own witness, the nurse, could not be said to have been exercised so as manifestly to have prejudiced the defendant. *Ibid.*

Statements of such a witness, which, it was held, the Commonwealth might introduce in evidence under R. L. c. 175, § 24, to impeach her credit as to some of her statements, if, before the evidence of such statements was introduced, the circumstances under which they were made, sufficient to designate



Abortion (*continued*).

the particular occasions, had been mentioned to the witness and she had been asked if she made the statements and had been given an opportunity to explain them. *Commonwealth v. Turner*, 229.

At such trial, testimony of a police officer is admissible to the effect that, four days after the alleged criminal act of the defendant and two days before the death of the woman, at a time when other evidence showed that the woman was at the house of the nurse, he saw the nurse and the defendant talking together at a point near the defendant's office. *Ibid*.

Denial of a motion for a new trial after a verdict of guilty at such trial, based upon the ground of the wrongful admission of testimony of one of the witnesses of the Commonwealth as to whom in his opening the prosecuting officer had stated that he anticipated "difficulty in getting the truth from this woman," and on the ground that, in his closing argument, the same officer had referred to the same witness as "an abortionist nurse," was held not to have been an abuse of discretion by the presiding judge. *Ibid*.

#### ACCOMPLICE.

A woman, whose death has been caused by a criminal operation to procure a miscarriage, is not an accomplice to the crime although she voluntarily went to the person who performed the operation and paid him for doing it, and, at the trial of an indictment for the crime under R. L. c. 212, § 15, the defendant may be convicted upon evidence contained in a dying declaration of the woman introduced under R. L. c. 175, § 65, without the introduction of evidence in corroboration of her statements. *Commonwealth v. Turner*, 229.

#### ACCORD AND SATISFACTION.

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for the creditor indorses and signs upon the execution an acknowledgment of the receipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's acknowledgment of satisfaction, and the creditor in an action of contract on the judgment may recover the balance of the debt. *Smith v. Johnson*, 50.

#### ACTION, SURVIVAL OF.

See SURVIVAL OF ACTION OR SUIT.

#### ACTIONABLE TORT.

The provisions of R. L. c. 201 do not permit the maintenance against the Commonwealth of a petition for the assessment of damages resulting from an ordinary tort committed by an officer or employee of the Commonwealth in the performance of duties prescribed by law. *Burroughs v. Commonwealth*, 28.

The State forester, neither by the provisions of St. 1904, c. 409, § 2, nor by Res. 1915, cc. 2, 23, is authorized to cut cord wood or clear brush upon the land of a private person for a price to be paid to the Commonwealth, and

by his doing so the Commonwealth is not made subject to the liability of a private person engaged in private business to answer in damages for torts committed by its employees in such work. *Bourroughs v. Commonwealth*, 28.

### ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

### ADVERSE POSSESSION OR USE.

Where one and his successors in title entered a peninsula of land containing about six hundred acres under a deed purporting to convey the entire title to the whole tract, which was recorded in the registry of deeds, and for a period of more than twenty years made use of the various parts of the peninsula, respectively arable land, marsh and woodland, for such purposes as usually accompany exclusive ownership of like property, a title by adverse possession was held to have been established. *Phipps v. Crowell*, 342.

The acquisition of a right of way over a passageway by its continuous use during a period of more than twenty years is not impaired by a temporary obstruction of the way during that period by means of barrels and planks placed by a stranger without authority from or ratification by the owner of the land over which the right of way is acquired. *Dornlee v. Lyons*, 256.

Before the passage of an ordinance requiring a permit and payment of a fee for the use of a stand in the market in Salem, for nearly one hundred years the premises had been used for a public market place and without charge to the public, but during that period ordinances had been passed relative to the market house and the market, and it was held that no uninterrupted adverse use had been shown which deprived the city of the use or control of property held for the benefit of the public. *Commonwealth v. Clay*, 271.

### AGENCY.

#### *Existence of Relation.*

Evidence at the trial of an action for personal injuries received by the plaintiff, when he was a traveller on the highway, by reason of his being run into by an automobile driven by the defendant's son-in-law, upon which it was held that the jury were warranted in finding that the automobile was owned by the defendant and that the son-in-law was his employee. *Heywood v. Ogasapian*, 203.

In an action by a boy, who when coasting down a street "duly licensed for coasting" was injured by a horse belonging to the defendant and ridden by a minor son of the defendant, it was held that there was no evidence for the jury that the defendant's son was acting as the servant or agent of his father at the time of the plaintiff's injury. *Poirier v. Terceiro*, 435.

Where the owner of a horse and wagon lets them with a driver to carry merchandise from place to place as directed by a servant of the hirer who accompanies the driver for that sole purpose, the driver as matter of law is the servant of the owner of the horse and wagon and not the servant of the hirer. *Peach v. Bruno*, 447.

Circumstances attending the lending to a contractor in a city by a master

*Agency (continued).*

teamster of "a teamster to take some concrete window-sills, wheel-barrows, picks and shovels out to M the next morning," upon which, upon a claim under the workmen's compensation act for injuries to the teamster, it could not be found that the teamster was in the employ of the contractor at the time of the injury. *Comerford's Case*, 571.

*Scope of Authority or Employment.*

The State forester, neither by the provisions of St. 1904, c. 409, § 2, nor by Res. 1915, cc. 2, 23, is authorized to cut cord wood or clear brush upon the land of a private person for a price to be paid to the Commonwealth, and by his doing so the Commonwealth is not made subject to the liability of a private person engaged in private business to answer in damages for torts committed by its employees in such work. *Burroughs v. Commonwealth*, 28.

Where a stockbroker holds shares of stock belonging to a customer with a general authority, either express or implied, to sell them, he has no authority to sell them to himself without the knowledge and assent of his customer, and, if he does so, the sale is voidable by the customer, although it may have been at auction and the full market price has been paid so that no harm has resulted. *Hall v. Paine*, 62.

Evidence at the trial of an action for personal injuries received by the plaintiff when he was run into by an automobile, upon which it was held that the jury were warranted in finding that the driver at the time of the accident was engaged in his employer's business of selling fruit, confectionery and ice cream. *Heywood v. Ogasapian*, 203.

Evidence at the trial of an action for personal injuries caused by the plaintiff being struck by a missile thrown by an employee of the proprietors of a circus who, while pulling up the stakes of the circus tent, was attempting to drive away a crowd of boys, upon which, it was held, it could be found that the person who threw the brick was acting within the scope of his employment in doing so, although the particular means he made use of might not have been contemplated by his employers. *Robinson v. Doe*, 319.

In an action of contract to recover commissions and also damages for the breach of an alleged contract to employ the plaintiff as agent for the sale of the defendant's produce and the taking of contracts for doing work with such product, it was held that under the circumstances it was error for the presiding judge to exclude the testimony of the defendant's secretary offered by the defendant to show that the authority of the defendant's agent to engage an agent "was limited to an agency for selling the product." *Nelson v. Imperial Water Proof Co. Ltd.* 388.

What are injuries arising out of and in the course of the employment of a workman for which he is entitled to compensation under the workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

*Employer's Liability.*

See that subtitle under NEGLIGENCE.

*Workmen's Compensation Act.*

See that title.

*Broker's Commission.*

See BROKER.

## AMENDMENT

See appropriate subtitles under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL.

## APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT; and the subtitle, Practice and procedure, under ATTORNEY AT LAW, *Disbarment*.

## APPORTIONMENT COMMISSIONERS.

The Suffolk County apportionment commissioners elected under St. 1913, c. 835, § 390, in 1915 and in every tenth year thereafter, who are directed to "so divide said county into representative districts of contiguous territory as to apportion the representation of said county, as nearly as may be, according to the number of voters of the several districts," must perform their duties as directed by art. 21 of the Amendments to the Constitution. *Attorney General v. Apportionment Commissioners*, 598.

And, where it is manifest from the inspection of an apportionment attempted to be made by them that there is grave, unnecessary and unreasonable inequality in the representation assigned by them to different districts, the Constitution has been violated and their attempted action is void. *Ibid*.

Inequalities, which were held to show gross and palpable inequalities extending to a considerable number of the districts, and to have been sufficient to make the attempted apportionment void. *Ibid*.

A petition for a writ of mandamus addressed to the Suffolk County apportionment commissioners, who had filed a report purporting to make an apportionment of representation in the legislative districts in that county which was void as in violation of art. 21 of the Amendments to the Constitution, commanding them to proceed with the performance of their duties under St. 1913, c. 835, in accordance with the provisions of the Constitution, affords the appropriate form of relief and is a remedy expressly provided by § 502 of the statute named for enforcing the provisions of that chapter. *Ibid*.

The remedy by mandamus described above is available to a citizen and voter interested in the execution of the laws. *Ibid*.

In the case above described it was held, that, the public interests being involved, the Attorney General might institute and maintain a petition for a writ of mandamus to vindicate the public right. *Ibid*.

On such a petition by the Attorney General, a clause in the reservation for determination of the case by this court, stating that, if the question whether the respondents acted in good faith was material this court might draw conclusions from the apportionment itself, was disregarded by this court because this court has no power to decide facts in a proceeding at law. *Ibid*.

In the case above described it was held that in issuing the writ of mandamus no specific time need be fixed for the completion by the commissioners of their work, it being assumed that they would be actuated by a consciousness of serious public duty with the obligations thereby entailed. *Ibid*.

## ARBITRAMENT AND AWARD.

See REFERENCE AND REFEREE.

## ARREST.

St. 1906, c. 203, § 1, relating to the examination of a judgment debtor preliminary to an order for his arrest on execution, is constitutional and is not in violation of the Declaration of Rights, arts. 1, 10, 11, 30. *Simon v. Justices of the Municipal Court*, 122.

It also was held that the statute was a law regulating rights of property and liberty within constitutional limits. *Ibid.*

It was held that certain procedure under such statute was judicial and that the statute in authorizing it was not an encroachment by the legislative upon the judicial department of the government. *Ibid.*

It also was held that this procedure conformed to established and appropriate methods of procuring and presenting evidence. *Ibid.*

## ASSESSMENT.

See TAX.

## ASSIGNMENT.

*What constitutes.*

A deed of land, in which the description by metes and bounds is followed by the words "Together with all our rights in said Channel of Island End River if any," conveys the rights of the grantors in the estuary named, but does not convey a right to compensation under R. L. c. 128, § 95, for the loss of land that was a part of a dam across Island End River through a wrongful registration of such land by a decree of the Land Court. *Briggs v. Treasurer & Receiver General*, 46.

A mortgage, in the usual form, of real estate which is subject to a lease operates as an assignment of the lease. *Noble v. Brooks*, 288.

Where a receiver is appointed to take possession of real estate that is subject to a lease, and a mortgagee of the property in possession surrenders the property to the receiver, this does not operate as an assignment of the lease to the receiver, and in suing on a covenant of the lease for accrued rent the receiver must sue in the name of the lessor. *Ibid.*

*Validity.*

The provisions of U. S. Rev. Sts. § 3477, declaring that all transactions and assignments of any claim upon the United States, or of any part or share thereof or interest therein, shall be absolutely null and void, do not affect the validity, as between the parties, of an assignment, as security for the payment of a promissory note, of "money to be received" by the maker of the note upon the performance by him of a contract with the United States. *Jennings v. Whitney*, 138.

Nor is the validity of such an assignment affected, as between the parties to it, by a provision in the contract with the United States "that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part [the maker of the note] shall annul the same, so far as the United States are concerned." *Jennings v. Whitney*, 138.

Where a client, who is unable to provide funds for the payment of the expenses of the prosecution of a suit against a third person, before the suit is brought assigns to an attorney at law, to secure payment to him for his legal services, all his interest in and to the claim, and there is no agreement that the attorney should not be paid for his services if he was unsuccessful in prosecuting the action, the assignment is not champertous and is valid. *Bennett v. Tighe*, 159.

#### *Construction and Effect.*

Circumstances under which an equitable lien created by an assignment of "money to be received" under an uncompleted contract with the United States for the manufacture and delivery of certain navy supplies, was enforceable in a suit in equity. *Jennings v. Whitney*, 138.

An assignment by the maker of a promissory note to the payee, as security for the payment of the note, of "money to be received" by the maker upon the performance, not yet completed, of a contract between him and a third person for the manufacture of certain articles, creates, as between the parties to the assignment, an equitable lien or charge upon the contract price when earned to the amount of the note and interest. *Ibid*.

Where, by the provisions of an assignment of a chose in action by a client to his attorney, it is clear that the whole amount of the claim was intended to be assigned, the assignee is entitled to receive accumulated interest as incidental to the right to receive the principal sum. *Bennett v. Tighe*, 159.

In an action by a surety company against the successors of trustees under a will upon an agreement to indemnify the plaintiff for any loss sustained by it by reason of its being surety upon the trustees' bonds, one of the defendants held assignments of the interests of the two trustees as beneficiaries of the income of the trust fund as security for their indebtedness to him, and it was held that this defendant as assignee stood in no better position than his assignors. *American Surety Co. of New York v. Vinton*, 337.

By reason of an instrument of assignment by a trust company which in good faith had taken as collateral security for a loan an instrument purporting to be a certificate for shares in a street railway corporation which instrument was identified as part of an attempted fraudulent over-issue of stock of the street railway corporation, it was held that a right of action of the trust company against the street railway corporation, based on the ground that the street railway corporation was estopped to deny that the trust company was a holder of its shares, passed to the assignees and no longer belonged to the trust company. *Smith v. Worcester & Southbridge Street Railway*, 564.

In a suit in equity brought by a trust company against a street railway corporation to compel the issuing of a new certificate to the plaintiff for the number of shares of stock of the street railway corporation named in the instrument described above, it was held that on the evidence the judge was warranted in construing the assignment to include the claim. *Ibid*.

*For Benefit of Creditors.*

A creditor who signs and accepts a common law assignment by his debtor for the benefit of creditors agrees to participate in the distribution of the property appropriated for the benefit of creditors upon the conditions designated in the instrument of assignment. *Gardiner v. Parsons*, 347.

## ATTACHMENT.

*Notice to Non-resident Defendant.*

The meaning of R. L. c. 170, § 1, and of §§ 6 and 9 of the same chapter, construed together, is that, where an effectual attachment of property of a non-resident defendant has been made, the best kind of notice which can be given under the circumstances shall issue. *Cheshire National Bank v. Jaynes*, 14.

*Tax Sale Lien Superior to Attachment.*

A purchaser at a sale of land for the collection of taxes, who at the time of the sale has no interest in the land other than that derived at the tax sale, gets a new title in fee unincumbered by an attachment previously placed upon the land in an action brought against the person who owned it at the time of the tax sale. *Davis v. Allen*, 551.

And if such purchaser afterwards conveys that title to one who, after the tax sale, acting for himself in good faith, had purchased all the right, title and interest of him who had owned the land at the time of the tax sale, such second purchaser also gets a title unincumbered by the attachment or by a sale under an execution and levy following it. *Ibid*.

*Dissolution.*

Where an attachment by trustee process has been dissolved by the giving of a bond with sufficient sureties approved by a master in chancery after notice and hearing given and conducted in pursuance of the requirements of R. L. c. 167, §§ 116, 117, the creditor of the trustee who was the defendant in the action in which the attachment by trustee process was made immediately may sue his debtor who was summoned as trustee without any further demand after the dissolution of the attachment. *Nessey v. Beard*, 305.

There is nothing in the Revised Laws nor elsewhere which requires that one who has been summoned as trustee by trustee process should receive any notice of an application by the defendant to a magistrate to dissolve the attachment. *Ibid*.

*Lapse.*

Under R. L. c. 167, § 56, which provides that "Property which has been attached in suits in equity shall be held for thirty days after the right of appeal from a final decree expires," where there is no right of appeal the right to levy execution under an attachment expires thirty days after the decree. *Tolman v. Tolman*, 501.

## ATTORNEY AT LAW.

*Disbarment.*

Practice and procedure.

A judge of the Superior Court is not disqualified from hearing a petition for the disbarment of an attorney at law by reason of such judge's membership in the bar association that instituted the proceedings. *Matter of Allin*, 9. The respondent in disbarment proceedings has no right to a trial by jury. *Matter of Carver*, 169.

Usual form of procedure in disbarment proceedings. *Matter of Allin*, 9. Such proceedings violate no constitutional right and no statutory provision. *Ibid.*

In disbarment proceedings, where an order for the disbarment of the accused attorney has been held by this court to have been warranted and a finding that the attorney was guilty of gross misconduct in his office also has been held to have been warranted, it is not a question of law for determination by this court whether an absolute removal or merely a suspension from practice for a specified period was required in order that the demands of justice might be met and the protection might be afforded to the public which only an upright bar can give. *Ibid.*

The denial of a motion for a rehearing in disbarment proceedings was held to have been a matter wholly within the discretion of the trial judge. *Ibid.*

The provisions of R. L. c. 173, §§ 79, 109, that in an action at law where exceptions have been filed judgment shall not be entered unless the exceptions are adjudged immaterial, frivolous or intended for delay, have no application to disbarment proceedings, in which an order for the disbarment of the accused attorney properly may be entered while exceptions taken by him are pending. *Ibid.*

It was said that it was not necessary to determine whether under the circumstances an order for disbarment might not have been based on grounds not included in the petition but found by the judge to exist. *Ibid.*

It also was held not to be necessary to determine whether the petition under the circumstances might not have been amended to conform to the evidence. *Ibid.*

If the respondent in proceedings for the disbarment of an attorney at law, who at the hearing on the petition made no requests for rulings and took no exceptions, sixteen days after an order by the trial judge disbarring him procures an extension of time for the filing of a bill of exceptions and then within the extended time files a bill of exceptions in which for the first time he claims an exception to the findings and order of the judge, Rule 45 of the Superior Court requires that the bill shall be disallowed. *Matter of Carver*, 169.

Under Rule 44 of the Superior Court, a clerk of the Superior Court must decline to enter an appeal by a respondent from an order entered in disbarment proceedings if the appeal is not presented within twenty days after the order is made. *Ibid.*

Conduct warranting disbarment.

The Superior Court, both under R. L. c. 165, § 44, and inherently, has power to remove an attorney at law from his office, not only because of misconduct



*Attorney at Law (continued).*

directly connected with his official duties, but also for such criminal or gross wrongdoing as makes manifest his unfitness to exercise the duties of his office. *Matter of Carter*, 169.

Fraudulent dealings and criminal conduct which were held to make an attorney's disbarment proper. *Ibid.*

Where an attorney at law brought an action for a woman client against certain defendants, and the action was settled by the entry of judgment for the defendants upon an agreement in writing signed by this attorney without the knowledge or special consent of his client and without giving her notice of it after it was entered, and where such entry of judgment was a part of the consideration given by such attorney for an option to him from the defendants to purchase certain real estate, and the attorney concealed this transaction from his client until she learned of it at some time later and brought a suit against him to enforce her rights, an order for the disbarment of the attorney is warranted. *Matter of Allen*, 9.

In disbarment proceedings based on the facts stated above, the circumstance, that the real estate speculation entered into by the attorney through the option thus acquired by him turned out disastrously for him, has no bearing upon his want of faithfulness to his client. *Ibid.*

If in such disbarment proceedings it should have been found that the attorney originally had authority from his client to dispose of her case as he deemed best, this would not justify his want of fidelity to her. *Ibid.*

The facts narrated above also were held to have justified a further finding made by the trial judge that the attorney was "guilty of gross misconduct in his office." *Ibid.*

*Validity and Effect of Assignment by Client to Attorney.*

Where a client, who is unable to provide funds for the payment of the expenses of the prosecution of a suit against a third person, before the suit is brought assigns to an attorney at law, to secure payment to him for his legal services, all his interest in and to the claim, and there is no agreement that the attorney should not be paid for his services if he was unsuccessful in prosecuting the action, the assignment is not champertous and is valid. *Bennett v. Tighe*, 159.

Where, by the provisions of such an assignment, it is clear that the whole amount of the claim was intended to be assigned, the assignee is entitled to receive accumulated interest as incidental to the right to receive the principal sum. *Ibid.*

*Value of Services.*

It was said that it is difficult to conceive of any matter more purely a question of fact than the fair value of the services of an attorney at law. *Smith v. Lloyd*, 173.

## ATTORNEY GENERAL.

Rights of Attorney General if it should appear that a certain charitable trust was not being properly administered. *Crawford v. Nies*, 474.

Attorney General may maintain a petition for a writ of mandamus addressed to the Suffolk County apportionment commissioners, who had filed a report

purporting to make an apportionment of representation in the legislative districts in that county which was void as in violation of art. 21 of the Amendments to the Constitution, commanding them to proceed with the performance of their duties under St. 1913, c. 835, in accordance with the provisions of the Constitution. *Attorney General v. Apportionment Commissioners*, 598.

#### AUDITOR.

Under R. L. c. 162, § 15, which provides that probate appeals "shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases," a reference of a probate appeal to an auditor "to hear the parties and their evidence, to find the facts, and report the same to the court" will be treated as a reference to a master and the auditor's report will be treated as a master's report. *Chapman v. Chapman*, 427.

#### AUTOMOBILE.

See MOTOR VEHICLE.

#### BANK.

In a suit in equity, by an administrator *de bonis non* of an estate against a bank in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, where it appeared that the bank had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate, it was held that the defendant was not bound to account for the amount of checks on the account of the estate deposited to the administrator's personal account on the days following certain overdrafts where other checks drawn upon other sources more than sufficient in amount to take up the overdraft were deposited on the same day. *Allen v. Fourth National Bank*, 239.

In the same suit it was held that under the circumstances the defendant was not bound to account to the plaintiff for the amount of certain checks on the account of the estate which made possible certification of certain checks on the administrator's personal account. *Ibid.*

Nor for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection. *Ibid.*

Provisions of a "trust receipt" given to a bank by an importer of hides were held not to operate as a pledge of the hides, because they never were delivered to the bank, nor as a mortgage of the hides as against creditors of the importer, because it was not recorded, nor as a trust in products manufactured from the hides and money received from the sale of a part of them which had been mingled with other products and other money so that they were not susceptible of separation and identification. *Peoples National Bank v. Mulholland*, 448.

BICYCLE.

Action for causing the death of a boy on a bicycle who was run over by a street railway car. *McKeechie v. Boston Elevated Railway*, 36.

BILLS AND NOTES.

*Delivery.*

The mere facts, that an agent of a life insurance company took to a beneficiary under a policy a check payable to the beneficiary's order for the amount to which he was entitled, that the beneficiary indorsed it by signing his mark on the back and that the agent then took it away because the beneficiary wanted cash and not a check, do not prove that the check was delivered to the beneficiary. *Shea v. Manhattan Life Ins. Co.* 112.

*Validity.*

A note and a mortgage securing the note, procured to be signed by duress exerted upon the maker and mortgagor, are voidable merely and not void, and therefore can be ratified and confirmed by the maker and mortgagor. *Webb v. Lothrop*, 103.

On an appeal, in a suit to enjoin the foreclosure of a mortgage, from a decree dismissing the bill, on all the evidence it was held that the plaintiff had failed to sustain a contention that the note and mortgage were void because their consideration was the compounding by the defendant of a felony of the plaintiff's husband or the stifling of a criminal prosecution against him. *Ibid.*

*Ratification.*

A note and a mortgage securing the note, procured to be signed by duress exerted upon the maker and mortgagor, are voidable merely and not void, and therefore can be ratified and confirmed by the maker and mortgagor. *Webb v. Lothrop*, 103.

Conduct of a woman, who under duress executed and delivered a note and a mortgage securing it in consideration of a return to her of documents which might have been the basis of criminal proceedings against her husband and also of the transfer to her of several mortgages, upon which, it was held, she must be taken to have ratified and confirmed the note and mortgage so that she was unable to maintain a suit in equity to have them declared void and to enjoin the foreclosure of the mortgage. *Ibid.*

*Suit in Equity for Collection.*

A bill in equity cannot be maintained to enforce the collection of certain negotiable bonds of which the plaintiff alleges that he was deprived unjustly by the defendant who procured possession of them by fraud and deceit, because a suit to collect a negotiable instrument can be maintained only by its holder. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

## BONA FIDE PURCHASER.

Rights of a *bona fide* purchaser of a tax title to real estate. *Davis v. Allen*, 551.

## BOSTON.

The giving of the notice required by St. 1913, c. 577, as amended by St. 1914, c. 119, is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant a permit to erect and maintain a garage in that city so far as the rights of those entitled to notice are affected. *Wright v. Lyons*, 167.

A permit granted by the board of street commissioners of the city of Boston under St. 1913, c. 680, to erect and maintain a post with a clock thereon set in the sidewalk of a public street of that city, without limitation as to time and without express reservation of a power to revoke the permit, is a revocable license, and the right granted does not become a contract by the erection of a post and clock in accordance with its terms. *Union Institution for Savings v. Boston*, 286.

## BROKER.

Where the owner of a hotel employed a real estate broker to find a tenant for it and the broker procured a person who executed with the owner a "memorandum of agreement" drafted with great care and setting forth certain terms of a proposed lease to be executed by the parties and "the principal points of their joint understanding," but which did not contain "all that the lease was intended to contain" and left the unexpressed terms of the lease to be agreed upon subsequently between the parties, and where the parties subsequently failed to agree on such terms and after certain negotiations the proposed tenant refused to take a lease of the hotel on the terms required by the owner, the broker cannot recover a commission for his services, because, in an action brought by him against the owner for such a commission, there is no evidence that the proposed tenant was ready and willing to become a tenant of the hotel on the owner's terms or that the owner accepted him as such a tenant. *Woods v. Matthews*, 577.

STOCKBROKER, see that title.

BROMFIELD STREET METHODIST EPISCOPAL CHURCH  
IN BOSTON.

Construction of a trust created by a deed of land on Bromfield Street in Boston in 1806 for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land, and the effect upon the trust of certain decrees in suits relating to it, of certain legislative enactments, and of a sale of the land and a moving of the religious society which formerly had occupied it. *Crawford v. Nies*, 474.

## CAPE COD CANAL.

Under St. 1899, c. 448, § 16, the licensee of oyster beds in Buzzards Bay may recover damages for loss suffered by reason of the pollution of the water

Cape Cod Canal (*continued*).

over the flats by a sediment of sand and decayed organic matter stirred up by the excavations in the course of the construction of the Cape Cod Canal, which caused the oysters to sicken and perish. *Taylor v. Boston, Cape Cod & New York Canal Co.* 307.

## CARRIER.

### *Of Passengers.*

Actions for personal injuries or death of passengers caused by negligence of street railway, elevated railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

### *Of Messages.*

Power of the public service commission to compel a telegraph company in the Commonwealth to furnish ticker service without discrimination. *Western Union Telegraph Co. v. Foster*, 365.

Although the sending of stock quotations by the New York Stock Exchange to a telegraph company at its place of business in Boston is interstate commerce, yet the furnishing of such quotations by the telegraph company to its customers or patrons in its ticker service at their Boston offices is domestic business and is analogous to selling at retail in the local market a commodity purchased at wholesale outside the Commonwealth. *Ibid*.

Consequently the federal interstate commerce act does not apply to such ticker service and it is subject to the law of this Commonwealth. *Ibid*.

## CEMETERY CORPORATION.

An attempt or offer made by a burial ground corporation to dedicate a lot marked out upon its land by stakes or bounds for the erection of a soldiers' monument, which was followed five months later by a deed from the corporation to the town of all its land that was accepted by the town without knowledge of the attempt or offer of the corporation to dedicate the lot for the purpose named, such purpose not being known by the town or by the public until nearly forty years after the conveyance to the town, does not constitute a completed dedication, there having been no acceptance by the public. *Mighill v. Rowley*, 586.

## CHAMPERTY.

Where a client, who is unable to provide funds for the payment of the expenses of the prosecution of a suit against a third person, before the suit is brought assigns to an attorney at law, to secure payment to him for his legal services, all his interest in and to the claim, and there is no agreement that the attorney should not be paid for his services if he was unsuccessful in prosecuting the action, the assignment is not champertous and is valid. *Bennett v. Tighe*, 159.

## CHARITY.

Under the circumstances it was held that a charitable corporation, organized "for the purpose of assisting discharged prisoners and others," by furnish-

ing them with a temporary home and employment, to lead honest and useful lives, could not be held liable in an action of tort brought by an inmate of its Home and a worker in its wood yard for personal injuries received by him due to a defective condition of a wood chopping machine of which the defendant's superintendent knew or should have known. *Conklin v. John Howard Industrial Home*, 222.

Construction of a trust created by a deed of land on Bromfield Street in Boston in 1806 for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land, and the effect upon the trust of certain decrees in suits relating to it, of certain legislative enactments, and of a sale of the land and a moving of the religious society which formerly had occupied it. *Crawford v. Nies*, 474.

#### CHARTER PARTY.

Where under a charter party a certain vessel was chartered for "as many successive voyages" as could be made between certain ports, "to run to" a certain date "or until steamer now in process of construction shall be substituted in place of" the vessel chartered, it was held that "dangers of the seas and navigation" were excepted, that the plaintiff was excused from performance after the sinking of the vessel and could recover demurrage for the detention of the vessel on the six completed voyages beyond the time allowed by the charter party. *Coastwise Transportation Co. v. New England Coal & Coke Co.* 244.

#### CHILD.

See PARENT AND CHILD.

#### CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

#### CLAMS.

It is erroneous, upon a complaint under R. L. c. 91, § 113, charging the defendant with having taken clams within prohibited bounds and containing no averment of a previous conviction for a like offence, to impose a sentence for more than a first offence, although in fact there may have been previous convictions which, if averred and proved, would have warranted the imposition of a greater sentence. *Walsh v. Commonwealth*, 39.

#### CLERKS OF COURTS.

Under Rule 44 of the Superior Court, a clerk of the Superior Court must decline to enter an appeal by a respondent from an order entered in disbarment proceedings if the appeal is not presented within twenty days after the order is made. *Matter of Carver*, 169.

Under R. L. c. 160, §§ 11, 36; c. 161, § 5, an assistant clerk of a district court has authority to receive a complaint addressed to the court and to administer the oath to the complainant. *Commonwealth v. Svarnas*, 597.

## COMITY.

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

And interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words. *Ibid.*

## COMMONWEALTH.

The Commonwealth cannot be presumed to have consented to be impleaded in its own courts to answer for torts committed by the employees of one of its officers acting beyond the scope of authority conferred by law. *Burroughs v. Commonwealth*, 28.

The provisions of R. L. c. 201 do not permit the maintenance against the Commonwealth of a petition for the assessment of damages resulting from an ordinary tort committed by an officer or employee of the Commonwealth in the performance of duties prescribed by law. *Ibid.*

The State forester, neither by the provisions of St. 1904, c. 409, § 2, nor by Res. 1915, cc. 2, 23, is authorized to cut cord wood or clear brush upon the land of a private person for a price to be paid to the Commonwealth, and by his doing so the Commonwealth is not made subject to the liability of a private person engaged in private business to answer in damages for torts committed by its employees in such work. *Ibid.*

The general exemption from taxation of the property of the Commonwealth in St. 1909, c. 490, Part I, § 5, cl. 2, does not apply to those portions of the Commonwealth Flats that are "leased for business purposes," which are expressly subjected to taxation by § 12. *Boston Fish Market Corp. v. Boston*, 31.

## COMMONWEALTH FLATS.

Under the provisions of a certain indenture between the Commonwealth, acting by the board of harbor and land commissioners, empowered thereunto by R. L. c. 96, § 3, and the Boston Fish Market Corporation, whereby the Commonwealth did "demise and lease unto" the corporation certain parts of Commonwealth Flats for a term of fifteen years, it was held that the corporation was not given a mere license under R. L. c. 96, § 17, but it was a lessee of the premises. *Boston Fish Market Corp. v. Boston*, 31.

And, if the lessee named above uses the premises for the purpose of subletting portions of them to persons who deal in fish, the premises are "leased" to it "for business purposes," although it does not itself engage in a mercantile business; and therefore, under the provisions of St. 1909, c. 490, Part I, § 12, the premises are subject to taxation. *Ibid.*

Constitutionality of such statute. *Ibid.*

Certain provision in such lease as to the payment by the lessee of "the annually recurring municipal tax," which was held to require the lessee to pay all the tax as assessed under St. 1909, c. 490, Part I, § 12, the word "municipal" as there used including the county and State taxes. *Boston Fish Market Corp. v. Boston*, 31.

The general exemption from taxation of the property of the Commonwealth in St. 1909, c. 490, Part I, § 5, cl. 2, does not apply to those portions of the Commonwealth Flats that are "leased for business purposes," which are expressly subjected to taxation by § 12. *Ibid.*

### COMPOUNDING OF FELONY.

On an appeal, in a suit to enjoin the foreclosure of a mortgage, from a decree dismissing the bill, on all the evidence it was held that the plaintiff had failed to sustain a contention that the note and mortgage were void because their consideration was the compounding by the defendant of a felony of the plaintiff's husband or the stifling of a criminal prosecution against him. *Webb v. Lothrop*, 103.

### CONFLICT OF LAWS.

In this action against a stockbroker with offices in Boston, New York and Chicago, to recover under the laws of Massachusetts certain amounts of money paid to the defendant as margins upon wagering contracts, where it appeared that the money was paid and the orders were given in Chicago, where the plaintiff lived, it was not determined but it was assumed that R. L. c. 99, § 4, applied, it being held that under the circumstances the defendant had done nothing to render him liable under the statute. *Mathys v. Hornblower*, 248.

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

And interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words. *Ibid.*

### CONSTITUTIONAL LAW.

#### *Apportionment of Representation.*

By art. 21 of the Amendments to the Constitution, providing for the dividing of the counties by special commissioners "into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the relative number of legal voters in the several districts of each county," the principle of practical



*Constitutional Law (continued).*

equality of representation among all the voters of the Commonwealth is established. *Attorney General v. Apportionment Commissioners*, 598.

The Suffolk County apportionment commissioners elected under St. 1913, c. 835, § 390, in 1915 and in every tenth year thereafter, who are directed to "so divide said county into representative districts of contiguous territory as to apportion the representation of said county, as nearly as may be, according to the number of voters in the several districts," must perform their duties as directed by art. 21 of the Amendments to the Constitution. *Ibid.* And, where it is manifest from the inspection of an apportionment attempted to be made by them that there is grave, unnecessary and unreasonable inequality in the representation assigned by them to different districts, the Constitution has been violated and their attempted action is void. *Ibid.*

Inequalities, which were held to show gross and palpable inequalities extending to a considerable number of the districts, and to have been sufficient to make the attempted apportionment void. *Ibid.*

*Class Legislation.*

This court, having held St. 1914, c. 778, to be unconstitutional on other grounds, found it unnecessary to consider whether it also was unconstitutional by reason of the preference attempted to be conferred upon combinations of laborers. *Bogni v. Perotti*, 152.

*Inviolability of Contract Rights.*

The Legislature has the power to change or to abrogate, to the loss of the municipalities, the terms and conditions contained in locations granted to street railway companies by the appropriate boards of towns and cities, although such grants of locations are phrased in the form of contracts and secure valuable financial obligations to the municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

And the public service commission, acting as public officers under St. 1913, c. 784, §§ 17, 19-22, 29, have power to do so by raising a rate of fare stated in the location. *Ibid.*

It was not necessary in the present case to determine whether, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon. *Ibid.*

*Due Process of Law.*

St. 1906, c. 203, § 1, relating to the examination of a judgment debtor preliminary to an order for his arrest on execution, is constitutional and is not in violation of the Declaration of Rights, arts. 1, 10, 11, 30. *Simon v. Justices of the Municipal Court*, 122.

*Fair Trial.*

Proceedings in the usual form for disbarment of an attorney at law violated no constitutional right of the attorney. *Matter of Allin*, 9.

*Equal Protection of Laws.*

St. 1909, c. 490, Part I, § 12, is not in contravention of the clause of the Fourteenth Amendment of the Constitution of the United States assuring "equal protection of the laws." *Boston Fish Market Corp. v. Boston*, 31.

St. 1906, c. 203, relating to the examination of a judgment debtor preliminary to ordering his arrest, was held to be a law regulating rights of property and liberty within constitutional limits. *Simon v. Justices of the Municipal Court*, 122.

The provisions contained in St. 1914, c. 778, § 2, declaring that "in construing this act" the right to labor and to make and modify contracts to work "shall be held and construed to be a personal and not a property right," and prohibiting the granting of an injunction to enforce such a right "where no irreparable damage is about to be committed upon the property or property right of either" the employee or the employer, are unconstitutional and void. *Bogni v. Perotti*, 152.

The power of courts to afford relief by injunction cannot be impaired by the Legislature in such a way as to prevent its use in favor of one property owner when it is preserved for the benefit of other property owners. *Ibid.*

The right to work is property and one cannot be deprived of it by legislative enactment, it being protected by the Fourteenth Amendment to the Constitution of the United States and by the guaranties contained in the Massachusetts Declaration of Rights. *Ibid.*

*Property Rights.*

The right to work is property and one cannot be deprived of it by legislative enactment, it being protected by the Fourteenth Amendment to the Constitution of the United States and by the guaranties contained in the Massachusetts Declaration of Rights. *Bogni v. Perotti*, 152.

St. 1914, c. 778, § 2, therefore is unconstitutional. *Ibid.*

*Charitable Trust.*

The Legislature was held to have no power to terminate a certain charitable trust created by a certain deed for the benefit of the worshippers at a certain church of a certain religious denomination. *Crawford v. Nies*, 474.

*Interstate Commerce.*

Although the sending of stock quotations by the New York Stock Exchange to a telegraph company at its place of business in Boston is interstate commerce, yet the furnishing of such quotations by the telegraph company to its customers or patrons in its ticker service at their Boston offices is domestic business and is analogous to selling at retail in the local market a commodity purchased at wholesale outside the Commonwealth. *Western Union Telegraph Co. v. Foster*, 365.

Consequently the federal interstate commerce act does not apply to such ticker service and it is subject to the law of this Commonwealth. *Ibid.*

St. 1913, c. 257, providing that a foreign corporation "which is engaged in or soliciting business in this Commonwealth" may be served with process in

Constitutional Law (*continued*).

the manner provided for service against domestic corporations is not made unconstitutional because it applies to corporations whose business transacted here is wholly interstate in its nature. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

*Separation of Departments of Government.*

It was held that a certain method of procedure under St. 1906, c. 203, relating to the examination of a judgment creditor preliminary to an order for his arrest, was judicial and that the statute in authorizing it was not an encroachment by the legislative upon the judicial department of the government. *Simon v. Justices of the Municipal Court*, 122.

*Taxation.*

St. 1909, c. 490, Part I, § 12, does not violate the constitutional requirement that a tax shall be "proportional and reasonable." *Boston Fish Market Corp. v. Boston*, 31.

It was not considered whether a statute would be constitutional, which showed a plain and unequivocal intention of imposing a tax upon a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

## CONTRACT.

*What constitutes.*

The act of a lessee in signing a proposed new lease, when not communicated to the landlord, could not be found to be an acceptance of the lease, and the former lessee's secret purpose to obtain an option if he could and, if he failed to obtain it, to take what was offered could not be made the basis of an enforceable contract. *Henchey v. Rathbun*, 209.

In the same case it was held that the duplicate original of the new lease signed by the landlord only, being an incomplete instrument, could not have the effect of a deed poll. *Ibid*.

A permit granted by the board of street commissioners of the city of Boston under St. 1913, c. 680, to erect and maintain a post with a clock thereon set in the sidewalk of a public street of that city, without limitation as to time and without express reservation of a power to revoke the permit, is a revocable license, and the right granted does not become a contract by the erection of a post and clock in accordance with its terms. *Union Institution for Savings v. Boston*, 286.

*Consideration.*

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for

the creditor indorses and signs upon the execution an acknowledgment of the receipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's acknowledgment of satisfaction, and the creditor in an action of contract on the judgment may recover the balance of the debt. *Smith v. Johnson*, 50.

In an action against the executor of the will of the plaintiff's father on an agreement in writing dated and alleged to have been executed by the plaintiff's father more than fifteen years before his death, whereby he promised to give to the plaintiff certain specific property "in consideration that he remain on the farm and manage the same for me in my old age," it was held that the son's readiness to carry the entire burden if the necessity for it arose and his actually doing all that his father was willing to leave to him might have been found to have been the consideration required by the contract. *Noyes v. Noyes*, 125.

#### *Failure of Consideration.*

Where one who, when attempting to perfect some machines for an inventor, procured money from a friend and signed an agreement that the money should be paid in stock of a corporation to be organized to manufacture and sell the machines and in cash, and in good faith labored diligently but in vain to perfect the machines, so that no corporation ever was formed, it was held that no action for money had and received could be maintained because there was no failure of consideration for the contract. *Palmer v. Guillow*, 1.

#### *Validity.*

Where a client, who is unable to provide funds for the payment of the expenses of the prosecution of a suit against a third person, before the suit is brought assigns to an attorney at law, to secure payment to him for his legal services, all his interest in and to the claim, and there is no agreement that the attorney should not be paid for his services if he was unsuccessful in prosecuting the action, the assignment is not champertous and is valid. *Bennett v. Tighe*, 159.

An agreement by a news company to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks," is valid. *Bay State Street Railway v. North Shore News Co.* 323.

#### *Construction.*

Where one who, when attempting to perfect some machines for an inventor, procured money from a friend and signed an agreement that the money should be paid in stock of a corporation to be organized to manufacture and sell the machines and in cash, and in good faith labored diligently but in vain to perfect the machines, so that no corporation ever was formed, it was held that no action for money had and received could be maintained because there was no failure of consideration for the contract. *Palmer v. Guillow*, 1.

Contract (*continued*).

Effect upon a contract of employment of a stockbroker by his customer of rules and usages of the stock exchange. *Hall v. Paine*, 62.

At the trial together of cross actions of contract between a lumberman and a lumber dealer upon a contract in writing for the sawing, piling and sale of certain lumber, where it appeared that the lumberman caused measurements to be made and recorded, but that the dealer did not, it was held that a tally by the dealer of the lumberman's recorded figures was not a compliance by the dealer with a requirement of the contract as to measurements by him. *Sheehan v. Eaton*, 82.

Proper construction of an application to a surety company to become surety on a bond to prosecute an appeal from a municipal court, which has written upon its margin the words, "Premium, \$5," and in which the provision as to a premium reads as follows, "To pay the said Company . . . a premium of        dollars (\$        ) annually in advance so long as said bond shall remain in force," requires that the word "five" should be supplied where the omission occurs. *Pacific Surety Co. of California v. Tove*, 98.

Construction of a certain charter party. *Coastwise Transportation Co. v. New England Coal & Coke Co.* 244.

Under a lease made for a term of twenty years from May 1, 1893, wherein the lessee covenanted to pay "all the taxes . . . , except betterments, whether in the nature of taxes now in being or not which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term," it was held that, by reason of St. 1909, c. 440, which changed the day of assessment from May 1 to April 1, the lessee must pay the tax assessed on April 1, 1913, although the result was that he had to pay the taxes for twenty-one years under a twenty year lease. *Welch v. Phillips*, 267.

Provisions of a contract for the sale and purchase of a parcel of land which were such that the buyer, when, after he had taken possession under his deed and had made improvements, he found that a town rightfully claimed rights in a natural watercourse across the rear of the parcel, could not maintain a suit in equity to enforce the specific performance of the contract of purchase or to reform the deed by inserting in it a covenant against incumbrances, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the stipulated sole remedy in that case being a rescission of the contract. *Levenberg v. Johnson*, 297.

\* Construction of an agreement by a news company to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks." *Bay State Street Railway v. North Shore News Co.* 323.

A contract made by a water company to furnish water for use on a certain property at the same rate charged to the former owner of the property, which was a fixed sum for the year, and "that the rate would continue the same for the present," was held to mean that the rate charged the former owner would be continued until changed by the company. *Scott v. Dedham Water Co.* 398.

And therefore, after a notification from the company that the fixed rate thereafter would be treated as a minimum charge and that all water used in excess of a certain number of gallons would be charged for at meter rates, the water

taker was bound to pay according to the changed rate, and, if he refused to do so, the company, under a right reserved by the regulations printed on its bills, might shut off the water for non-payment of water rates. *Scott v. Dedham Water Co.* 398.

Provisions of a "trust receipt," given to a bank by an importer of hides, were held not to operate as a pledge of the hides, because they never were delivered to the bank, nor as a mortgage of the hides as against creditors of the importer, because it was not recorded, nor as a trust in products manufactured from the hides and money received from the sale of a part of them which had been mingled with other products and other money so that they were not susceptible of separation and identification. *Peoples National Bank v. Mulholland*, 448.

Construction of lease of land, see appropriate subtitle under LANDLORD AND TENANT.

### *Performance and Breach.*

Where one who, when attempting to perfect some machines for an inventor, procured money from a friend and signed an agreement that the money should be paid in stock of a corporation to be organized to manufacture and sell the machines and in cash, and in good faith labored diligently but in vain to perfect the machines, so that no corporation ever was formed, it was held that no action for money had and received could be maintained because there was no failure of consideration for the contract. *Palmer v. Guillow*, 1.

It also was held for the same reasons, that an action could not be maintained for breach of the contract by the intestate. *Ibid.*

At the trial together of cross actions of contract between a lumberman and a lumber dealer upon a contract in writing for the sawing, piling and sale of certain lumber, where it appeared that the lumberman caused measurements to be made and recorded, but that the dealer did not, it was held that a tally by the dealer of the lumberman's recorded figures was not a compliance by the dealer with a requirement of the contract as to measurements by him. *Sheehan v. Eaton*, 82.

At the same trial evidence offered by the dealer of measurements made by purchasers of the lumber from him to the effect that the measurements marked thereon by the lumberman were too large was held to be incompetent. *Ibid.*

It appearing that the only measurements made in accordance with the provisions of the contract were made by the lumberman, it was held that his measurements were conclusive and binding upon the parties unless there was a mathematical error made by him in adding them. *Ibid.*

Evidence offered by the dealer as to the result of a tally taken by him, which tended to show that the total of the measurements recorded by the lumberman, 748,831 feet, was about 50,000 feet in excess of the tally, was held to have been admissible because it tended to show a palpable mathematical error by the lumberman in adding his measurements. *Ibid.*

In an action against the executor of the will of the plaintiff's father on an agreement in writing dated and alleged to have been executed by the plaintiff's father more than fifteen years before his death, whereby he promised to give to the plaintiff certain specific property "in consideration that he remain on the farm and manage the same for me in my old age," the question

Contract (*continued*).

whether the plaintiff had performed his part of the contract by managing the farm was a question of fact. *Noyes v. Noyes*, 125.

Certain charter party was held to have been performed by the owner, although the vessel was lost before the term for which she was chartered had passed. *Coastwise Transportation Co. v. New England Coal & Coke Co.* 244.

#### *Ratification.*

In an action against a stockbroker for the value of certain shares of stock which the plaintiff alleged that the defendant had sold without his authority, where the plaintiff had received and retained the defendant's check for the balance of his account as stated by the defendant, it was held, that it could not be ruled as matter of law that the plaintiff had affirmed the sales which he sought to avoid. *Hall v. Paine*, 62.

Ratification of negotiable promissory note which had been procured by duress. *Webb v. Lothrop*, 103.

#### *Reformation.*

Provisions of a contract for the sale and purchase of a parcel of land which were such that the buyer, when, after he had taken possession under his deed and had made improvements, he found that a town rightfully claimed rights in a natural watercourse across the rear of the parcel, could not maintain a suit in equity, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the sole remedy in that case being a rescission of the contract. *Levensberg v. Johnson*, 297.

#### *Rescission.*

One who has the right to avoid a sale of shares of stock made for him by a broker to the broker himself personally under a usage of the stock exchange unknown to the customer, must exercise his right of avoidance within a reasonable time after he learns of the facts or after he might learn of the facts by inquiry under circumstances that would put a man of ordinary intelligence upon inquiry. *Hall v. Paine*, 62.

In an action against the executor of the will of the plaintiff's father on an agreement in writing dated and alleged to have been executed by the plaintiff's father more than fifteen years before his death, whereby he promised to give to the plaintiff certain specific property "in consideration that he remain on the farm and manage the same for me in my old age," a certain subsequent agreement and course of conduct of the father and son were held not necessarily to be inconsistent with the earlier contract that the plaintiff should continue to receive pay for work actually performed by him and that it could not be said that as matter of law the contract had been rescinded. *Noyes v. Noyes*, 125.

Attempt by the buyer of an automobile to rescind the sale by a letter, sent while the car was in a garage, for breach of an oral warranty that the car was in perfect running order, was held to be ineffectual because he did not offer to return or tender the car to the seller and demand the return of the consideration until one month and four days after the date of his letter,

which was held not to be within a reasonable time after he had knowledge that the warranty was broken. *Skillings v. Collins*, 275.

In the provisions of the sales act relating to rescission for a breach of warranty contained in St. 1908, c. 237, § 69, cls. 3, 4, the word "offer" as used in relation to an offer to return the goods is synonymous with the word "tender." *Ibid.*

#### *In Writing.*

Proper construction of an application to a surety company to become surety on a bond to prosecute an appeal from a municipal court, which has written upon its margin the words, "Premium, \$5," and in which the provision as to a premium reads as follows, "To pay the said Company . . . a premium of        dollars (\$ ) annually in advance so long as said bond shall remain in force," requires that the word "five" shall be supplied where the omission occurs. *Pacific Surety Co. of California v. Toye*, 98.

#### *Implied.*

Where one who, when attempting to perfect some machines for an inventor, procured money from a friend and signed an agreement that the money should be paid in stock of a corporation to be organized to manufacture and sell the machines and in cash, and in good faith labored diligently but in vain to perfect the machines, so that no corporation ever was formed, it was held that no action for money had and received could be maintained because there was no failure of consideration for the contract. *Palmer v. Guillow*, 1.

An action of tort or contract, with a declaration containing counts for the conversion of money and for money had and received and upon an account annexed, may be maintained although the plaintiff, upon the same facts, might have relief in equity for the termination of a trust and an accounting. *Flye v. Hall*, 528.

Relevant inquiry, at the trial of an action by the administrator of the estate of a mother against her daughter for money had and received where the plaintiff contended that the mother gave to the daughter sums of money at various times to be used for the mother's support and that the daughter was retaining a portion of such money that had not been expended, as to certain financial dealings between the parties. *Ibid.*

At the same trial an unsigned statement of the account between the parties which, according to some of the evidence, was handed by the defendant to the plaintiff, was admissible in evidence as an admission by the defendant, although she denied having given it to the plaintiff. *Ibid.*

Also, testimony of the defendant as a witness in a proceeding in the Probate Court, which tended to contradict her testimony at the current trial, was admissible in evidence. *Ibid.*

#### *Of Indemnity.*

An agreement by a news company, to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding,



Contract (continued).

riding upon or leaving the cars of the street railway company, or while on or about its tracks," was held to include indemnity for the satisfaction of an execution issued against the street railway company in an action by a newsboy employed by the news company who was kicked in the stomach by a conductor on a car of the street railway company when he was on the top step going into the car and indemnity for expenses incurred by the street railway company in defending such action. *Bay State Street Railway v. North Shore News Co.* 323.

Such an agreement is valid. *Ibid.*

The liability of the news company under the unambiguous terms of the contract described above was held not to be affected by a provision in the contract that the news company should take out insurance to protect both companies from loss on account of "injuries to the employees of the news company on or about the cars and tracks of the street railway company," even if the liability described by the clause last quoted was not so broad. *Ibid.*

#### *As to Locations of Street Railways.*

The Legislature has the power to change or to abrogate, to the loss of the municipalities, the terms and conditions contained in locations granted to street railway companies by the appropriate boards of towns and cities, although such grants of locations are phrased in the form of contracts and secure valuable financial obligations to the municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

And the public service commission, acting as public officers under St. 1913, c. 784, §§ 17, 19-22, 29, have power to do so by raising a rate of fare stated in the location. *Ibid.*

It was not necessary in the present case to determine whether, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon. *Ibid.*

#### *By Son to support Father.*

In an action against the executor of the will of the plaintiff's father on an agreement in writing dated and alleged to have been executed by the plaintiff's father more than fifteen years before his death, whereby he promised to give to the plaintiff certain specific property "in consideration that he remain on the farm and manage the same for me in my old age," a certain subsequent agreement and course of conduct of the father and son were held not necessarily to be inconsistent with the earlier contract that the plaintiff should continue to receive pay for work actually performed by him and that it could not be said that as matter of law the contract had been rescinded. *Noyes v. Noyes*, 125.

It also was held that the son's readiness to carry the entire burden if the necessity for it arose and his actually doing all that his father was willing to leave to him might have been found to have been the consideration required by the contract, and that the question whether the plaintiff had performed his part of the contract by managing the farm was a question of fact. *Ibid.*

In the case above described it appeared that the will of the plaintiff's father contained a general direction to pay all the testator's debts and that a part of the property promised to the plaintiff by the contract and also other property not included in the contract were devised specifically to the plaintiff by the will, and it was held that the judge properly instructed the jury that the measure of damages was the difference between the value of the property described in the contract and the portion of the property so described which the plaintiff took under the will. *Noyes v. Noyes*, 125.

As to a contention in the above case that, under the circumstances, the plaintiff, by accepting the benefits given him by the will, had exercised an election to ratify its provisions, which was introduced by the defendants for the first time at the argument before this court, it was held that the contention was not open upon the exceptions before this court, but it was said that, before the entry of final judgment, the defendants had the right to move in the Superior Court for a new trial on the ground "that, by mistake of parties or counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried." *Ibid*.

#### *Wagering Contracts.*

See that title.

#### *Severance of Joint Liability by Death.*

A joint liability in contract is severed by the death of one of the joint promisors and thereupon the promisee may proceed severally either against the surviving promisor or against the representative of the estate of the deceased promisor. *American Surety Co. of New York v. Vinton*, 337.

#### *Effect of Usage.*

Effect upon a contract of employment of a stockbroker by his customer of rules and usages of the stock exchange. *Hall v. Paine*, 62.

### CONVERSION.

An action of tort or contract, with a declaration containing counts for the conversion of money and for money had and received and upon an account annexed, may be maintained although the plaintiff, upon the same facts, might have relief in equity for the termination of a trust and an accounting. *Flye v. Hall*, 528.

### CORPORATION.

#### *Officers and Agents.*

Right under certain circumstances of a minority stockholder to maintain a suit in equity in his own behalf and in behalf of the corporation to set aside a transfer by the majority stockholders and officers to themselves as trustees for their own benefit of all the corporation's property, and to compel an accounting and restoration by the majority stockholders. *Cole v. Wells*, 504.

Corporation (continued).

*Stockholder's Rights.*

Mandamus is not the proper remedy for compelling a corporation to comply with the provisions of St. 1903, c. 437, § 44. *Teale v. Rockport Granite Co.* 20.

Vote of a corporation, organized in 1864 for the purposes of "quarrying and preparing for the market of stone" in two specified towns, "and for selling the same," by which, it was held, the corporation "voted . . . to change the nature of its business," so that a stockholder who voted against such change might have payment for his stock in accordance with the provisions of St. 1903, c. 437, § 44. *Ibid.*

And if, after such a stockholder has made the demand in writing specified in the statute and the corporation has refused payment for his stock, the stockholder appoints an appraiser and notifies the corporation, but it refuses to appoint an appraiser, the stockholder by a bill in equity may compel the appointment of such an appraiser and compliance by the corporation with the provisions of the statute. *Ibid.*

Such stockholder's rights are not precluded by the facts that, throughout the greater part of the period from the organization of the corporation in 1864 to the date of the vote referred to, the directors had done the things specified in the vote, had reported their doings to the stockholders and the stockholders had made no objection. *Ibid.*

Nor are the rights of the stockholder affected by the fact that, while his suit in equity was pending, the corporation tendered to him and he received a dividend on his shares of stock. *Ibid.*

Right under certain circumstances of a minority stockholder to maintain a suit in equity in his own behalf and in behalf of the corporation to set aside a transfer by the majority stockholders and officers to themselves as trustees for their own benefit of all the corporation's property, and to compel an accounting and restoration by the majority stockholders. *Cole v. Wells*, 504.

In St. 1903, c. 437, § 44, giving a stockholder in a corporation, who has voted against a sale by the corporation of all of its property and assets, a right, upon a demand in writing within thirty days after such vote, to receive "the value of the stock" held by him which, if he and the corporation cannot agree thereto, shall be determined by appraisers, the words, "the value of the stock," mean not merely its market value if it is traded in by the public, but its intrinsic value, to determine which all the assets and liabilities of the corporation must be ascertained. *Ibid.*

Conduct of such a minority stockholder, who, after he had made a demand in writing of the corporation for the value of his shares under St. 1903, c. 437, § 44, and while he was seeking to ascertain the real value of the shares, discovered fraud of the majority stockholders lessening the value of the shares but agreed with them to submit the matter of the appraisal of the value of his shares to certain arbitrators under the statute, was held under the circumstances not to be a binding election to waive his right to maintain a suit in equity to compel an accounting and restitution by the majority stockholders. *Ibid.*

The right given by St. 1903, c. 437, § 44, to a minority stockholder to compel a corporation, the majority of whose stockholders against his vote have voted to transfer all of its property and assets, to pay him the value of his

shares, and his right, pending such payment to him, to compel an accounting by the majority stockholders who, while in control of the corporation, have misappropriated its property and manipulated and falsified its accounts so as to conceal their fraud and to make it difficult if not impossible to ascertain the true state of the corporation's assets, are not inconsistent but are concurrent. *Cole v. Wells*, 504.

Until such a minority stockholder has been paid the value of his shares, determined as provided by the statute, he still is a stockholder and has a right to pursue in equity his rights as such minority stockholder in behalf of the corporation against the majority stockholders to compel an accounting and restitution by them. *Ibid*.

#### *Stockholder's Liability.*

Suit by the receiver of an insolvent national bank for the collection of the amount of an assessment made by the comptroller of the currency upon the shareholders. *Weitzel v. Brown*, 190.

#### *Transfer of Shares.*

Deposit by the owner of shares in a foreign corporation, with a stockbroker as additional margin to secure his account, of his certificate with his signature on the back but not to a power of attorney to transfer and without compliance with the requirements of the foreign law in regard to transfers of shares, was held not sufficient to enable a trust company to whom the stockbroker had pledged the shares to maintain a bill in equity to compel a transfer of shares to it, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

In the case above described it was said that, although the provision of the uniform stock transfer act contained in St. 1910, c. 171, § 9, relating to the transfer of certificates of shares does not apply to a transfer of shares in such a foreign corporation, yet the general rule of equity applicable to the case is stated correctly in § 9. *Ibid*.

#### *Attempted Over-issue of Stock.*

By reason of an instrument of assignment by a trust company which in good faith had taken as collateral security for a loan an instrument purporting to be a certificate for shares in a street railway corporation, which instrument was identified as part of an attempted fraudulent over-issue of stock of the street railway corporation, it was held that a right of action of the trust company against the street railway corporation, based on the ground that the street railway corporation was estopped to deny that the trust company was a holder of its shares, passed to the assignees and no longer belonged to the trust company. *Smith v. Worcester & Southbridge Street Railway*, 564.

And it therefore was held that the trust company could not maintain a suit in equity to compel the street railway corporation to issue to it a new certificate for the number of shares named in the instrument. *Ibid*.

*Change of Business.*

Vote of a corporation, organized in 1864 for the purposes of "quarrying and preparing for the market of stone" in two specified towns, "and for selling the same," by which, it was held, the corporation "voted . . . to change the nature of its business." *Teale v. Rockport Granite Co.* 20.

*Taxation.*

Under St. 1909, c. 490, Part III, § 43, the tax commissioner when ascertaining, for the purpose of imposing the excise authorized by the statute, the value of the corporate franchise of a domestic corporation engaged in the business of lending money at interest secured by pledges of articles of personal property of which it holds possession while the general title to the articles is in its customers, in computing the maximum limit of twenty per cent of the value of the things named in the statute must include under the word "merchandise" the articles of personal property thus held in pledge. *Boston Loan Co. v. Commonwealth*, 181.

*Charitable.*

Under the circumstances it was held that a charitable corporation, organized "for the purpose of assisting discharged prisoners and others," by furnishing them with a temporary home and employment, to lead honest and useful lives, could not be held liable in an action of tort brought by an inmate of its Home and a worker in its wood yard for personal injuries received by him due to a defective condition of a wood chopping machine of which the defendant's superintendent knew or should have known. *Conklin v. John Howard Industrial Home*, 222.

*Foreign.*

Facts relating to a resident passenger agent, which were held to warrant a finding that a railroad corporation organized under the laws of another State was engaged in business in as well as soliciting business in this Commonwealth, so that under St. 1913, c. 257, such corporation might be served with process in the manner provided for service in actions against domestic corporations. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

St. 1913, c. 257, is not made unconstitutional because it applies to corporations whose business transacted here is wholly interstate in its nature. *Ibid.*

The validity of the provision of St. 1913, c. 257, making the effect of soliciting business by a foreign corporation in this Commonwealth the same as that of transacting business here, was not involved in the present case, where the foreign corporation rightly was found to be doing business in this Commonwealth. *Ibid.*

A foreign corporation which in a suit in equity has filed a plea to the jurisdiction of the court, denying that it has been served with process lawfully, was held not to have waived this plea by taking part in an argument upon the question of whether a preliminary injunction ought to issue. *Ibid.*

It was said that, although the provision of the uniform stock transfer act contained in St. 1910, c. 171, § 9, relating to the transfer of certificates of

shares did not apply to a transfer of shares in a certain foreign corporation, yet the general rule of equity applicable to the case is stated correctly in § 9. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

#### *Corporate Fraud.*

Evidence which was held not to be sufficient for the maintenance of an action of replevin by a seller of goods against the assignee for the benefit of creditors of the buyer, a corporation, to compel the return of the goods on the ground that the buyer purchased them with the actual but undisclosed intention not to pay for them, where it appeared that the treasurer of the corporation, its financial backer, had withdrawn his support the day after the sale. *Phinney v. Friedman*, 531.

But evidence as to a sale thirty days after the treasurer withdrew his support, when the buyer was insolvent, was held to warrant the maintenance of an action of replevin for the return of the goods then sold. *Ibid.*

#### COVENANT.

Provisions of a contract for the sale and purchase of a parcel of land which were such that the buyer, when, after he had taken possession under his deed and had made improvements, he found that a town rightfully claimed rights in a natural watercourse across the rear of the parcel, could not maintain a suit in equity, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the stipulated sole remedy in that case being a rescission of the contract. *Lewenberg v. Johnson*, 297.

Construction of covenant in lease, see appropriate subtitle under LANDLORD AND TENANT.

#### CUSTOM.

See USAGE.

#### CY PRES.

Circumstances surrounding a trust created by a deed of land on Bromfield Street in Boston in 1806 for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land, and the effect of a sale of the land and a moving of the religious society which formerly had occupied it were held to present no occasion for an application of the doctrine of *cy pres*. *Crawford v. Nies*, 474.

#### DAMAGES.

*For Property taken or impaired under Statutory Authority.*

Proper decree for the plaintiff in a suit in equity to redeem land from a tax sale, where it appears that since the tax sale the land has been taken by eminent domain for water supply purposes and that a claim for damages resulting from such taking is unsatisfied. *Glazier v. Everett*, 184.

*Damages (continued).*

Acts of the road commissioners of a town which, it was held, constituted as matter of law an entry and taking possession of a way for the purpose of construction within the meaning of R. L. c. 48, § 92, and also within the meaning of § 28 of the same chapter, after an order of relocation had been passed by the county commissioners, so that a petition for the assessment of damages by a jury filed more than one year thereafter was dismissed. *Goulding v. Concord*, 292.

*For Breach of Contract.*

In an action against a stockbroker for the value of certain shares of stock, it was held that the rule as to computing damages by the highest intermediate value of the shares is not applied to such a case in this Commonwealth. *Hall v. Paine*, 62.

In an action against a stockbroker by a customer, for the value of certain shares of stock sold without authority, where the plaintiff has established the fact that he exercised his right of avoidance of such sales of shares of stock within a reasonable time, the plaintiff, if he shows that the defendant made certain sales of the plaintiff's stocks to himself personally, can recover the difference between the value of the stocks when sold and their value when the sales were made known to and were repudiated by him, with interest from that date. *Ibid.*

*In Tort.*

Where, with the acquiescence of the plaintiff, an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

*In Equity.*

If, during ten months while a suit in equity by a purchaser seeking a rescission of the sale of the capital stock of a corporation for fraud of the seller was pending, the plaintiff carried on the business of the corporation and made the enterprise successful, and the plaintiff elected to waive the prayers of the bill relating to rescission, the court, having had jurisdiction in equity when the suit was brought, in a proper exercise of its discretion may retain the suit solely for the assessment of damages. *Rosen v. Mayer*, 494.

## DEATH.

A joint liability in contract is severed by the death of one of the joint promisors and thereupon the promisee may proceed severally either against the surviving promisor or against the representative of the estate of the deceased promisor. *American Surety Co. of New York v. Vinton*, 337.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death*.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

### DEDICATION.

In this Commonwealth a dedication of land to a public use does not take effect without an acceptance by the public. *Mighill v. Rowley*, 586.

An attempt or offer made by a burial ground corporation to dedicate a lot marked out upon its land by stakes or bounds for the erection of a soldiers' monument, which was followed five months later by a deed from the corporation to the town of all its land that was accepted by the town without knowledge of the attempt or offer of the corporation to dedicate the lot for the purpose named, such purpose not being known by the town or by the public until nearly forty years after the conveyance to the town, does not constitute a completed dedication, there having been no acceptance by the public. *Ibid*.

### DEED.

#### *Delivery.*

It seems that a deed, which was acknowledged five months after its date and was recorded eleven months after its acknowledgment, in the absence of other evidence of the time of its delivery, must be taken to have been delivered on the day of its acknowledgment. *Mighill v. Rowley*, 586.

#### *Construction.*

A deed of land, in which the description by metes and bounds is followed by the words "Together with all our rights in said Channel of Island End River if any," conveys the rights of the grantors in the estuary named, but does not convey a right to compensation under R. L. c. 128, § 95, for the loss of land that was a part of a dam across Island End River through a wrongful registration of such land by a decree of the Land Court. *Briggs v. Treasurer & Receiver General*, 46.

Where in a deed of a lot of land the only reference to an alleged private street is that a boundary of the lot is described as beginning on a certain avenue at the corner of a street, when in fact there is no street and no indication of a street, and the only indication that a street ever was contemplated is the fact that two posts were placed by the grantor on the line of the avenue about forty feet apart, which posts remained there only a short time, there is nothing to estop one, who owns the adjoining land under a subsequent deed from the same grantor and who purchased it after the posts had disappeared, from denying the existence of an alleged private street forty feet wide over his land. *Ralph v. Clifford*, 58.

A deed of land recited that the consideration was paid by B "as he is Trustee of a voluntary association known as the" O Company. The grant was to B "Trustee" and the habendum to B, "Trustee, and his successors theirs and assigns." A declaration of trust by B as trustee of the O Company, an unincorporated association of individuals formed for the purpose of dealing in land, was recorded in the same registry of deeds as was the deed. The declaration of trust was not referred to specifically in the deed. It was held



Deed (*continued*).

that the conveyance was intended to be to B in his capacity as trustee for the association. *Glasier v. Everett*, 184.

*Tax Collector's Deed.*

See appropriate subtitle under TAX.

DEVISE AND LEGACY.

*Vested Interest.*

Under the provisions of a certain will whereby trustees were directed to retain a sum sufficient to pay certain annuities and to distribute the rest of the estate "among my said nephews and nieces . . . share and share alike, the issue of any such deceased nephew or niece, taking its parent's share by right of representation," and, upon the death of the survivor of the annuitants, to pay over all sums remaining to the "same parties and in like manner," it was held that at the death of the testator the interest in remainder in the trust fund vested in the "said nephews and nieces" then living. *Linscott v. Trowbridge*, 108.

*Time of Vesting.*

In a provision in a will for an ultimate distribution of a trust fund "to my grand-nephews and grand-nieces, if any, who may then be living," it was held that the words "then be living" referred to the grand-nephews and grand-nieces of the testatrix alive at the death of the last survivor of life beneficiaries and that the gift then vested in them, although possession was postponed until they should arrive respectively at the age of twenty-one years. *Dexter v. Attorney General*, 215.

Accordingly it was ordered that upon their respective arrivals at that age an equal distribution of the fund should be made to the grand-nephew, the grand-niece and to any issue of the married niece of the testatrix who might be born within nine months after the death of the last survivor of the life beneficiaries. *Ibid.*

*Whether Benefaction or Payment of Debt.*

Where there is no statement in a will that a devise or legacy is in payment of a debt in whole or in part, the general rule is that the testamentary gift is to be regarded as a benefaction and not as a payment. *Noyes v. Noyes*, 125.

Application of the foregoing in an action by a son against the executors of his father's will upon a contract by the father to give him certain specified property "in consideration that he remain on the farm and manage the same for me in my old age," where it appeared that the will of the plaintiff's father contained a general direction to pay all the testator's debts and that a part of the property promised to the plaintiff by the contract and also other property not included in the contract were devised specifically to the plaintiff by the will. *Ibid.*

*Widow's Interest.*

Construction of a will in the handwriting of the testator and apparently drawn by him without consultation with counsel, which gave the income of the residue of his estate to his wife "during her life" with a power to use the principal for "the best interest of my children at her discretion" and upon her death divided the residue equally among his children, and which contained a provision enlarging the power of the wife over the residue after the death of all his children and for a gift over to the testator's sisters, upon which it was held that after the death of all the testator's children an absolute gift was not given to the widow of the whole property, but on the contrary a valid gift was made over to his sisters. *Dallinger v. Merrill*, 534.

And, therefore, the widow having waived the provisions for her in the will, upon the death of the son during the widow's lifetime the sisters took an absolute estate in the residue subject to the statutory rights of the widow. *Ibid.*

*Advancement.*

Construction of a will giving a legacy to the testator's son, out of which were to be paid certain notes, and circumstances which were held to show that it was the testator's intention that a certain loan should be treated as in the nature of an advancement to his son and that the balance only, if any, should be paid to him as a legacy. *Pierce v. Loomis*, 226.

## DISBARMENT.

See appropriate subtitle under ATTORNEY AT LAW.

## DISTRICT COURT.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

## DIVORCE.

See MARRIAGE AND DIVORCE.

## DURESS.

A note and a mortgage securing the note, procured to be signed by duress exerted upon the maker and mortgagor, are voidable merely and not void, and therefore can be ratified and confirmed by the maker and mortgagor. *Webb v. Lothrop*, 103.

## EASEMENT.

The acquisition of a right of way over a passageway by its continuous use during a period of more than twenty years is not impaired by a temporary obstruction of the way during that period by means of barrels and planks placed by a stranger without authority from or ratification by the owner of the land over which the right of way is acquired. *Dornsee v. Lyons*, 256.

Before the passage of an ordinance requiring a permit and payment of a fee for the use of a stand in the market in Salem, for nearly one hundred years the premises had been used for a public market place and without charge

*Easement (continued).*

to the public, but during that period ordinances had been passed relative to the market house and the market, and it was held that no uninterrupted adverse use had been shown which deprived the city of the use or control of property held for the benefit of the public. *Commonwealth v. Clay*, 271.

### ELECTION.

A contention, in an action by a son against the executors of his father's will upon a contract in writing promising certain specific property to the son if he would manage the father's farm in the father's old age, that, under the circumstances, the plaintiff by accepting the benefits given by the will had exercised an election to ratify its provisions, which was introduced by the defendants for the first time at the argument before this court, was held not open upon the exceptions before this court, but it was said that, before the entry of final judgment, the defendants had the right to move in the Superior Court for a new trial on the ground "that, by mistake of parties or counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried." *Noyes v. Noyes*, 125.

Attempt by the buyer of an automobile to rescind the sale by a letter, sent while the car was in a garage, for breach of an oral warranty that the car was in perfect running order, was held to be ineffectual because he did not offer to return or tender the car to the seller and demand the return of the consideration until one month and four days after the date of his letter which was held not to be within a reasonable time after he had knowledge that the warranty was broken. *Skilling v. Collins*, 275.

In a suit in equity by a lessor against the lessee and his assignee for the benefit of creditors to enforce the rights of the plaintiff under the lease which had been terminated by the lessor in accordance with its terms, it was held that, under the circumstances, whether the plaintiff elected under the provisions of the lease to claim damages or to claim indemnity was a question of fact with the burden of proof resting on the plaintiff, and that whether the plaintiff by letting a part of the premises to the former lessee waived his claim for damages also was a question of fact. *Gardiner v. Parsons*, 347.

Plaintiff's election waiving in a bill in equity prayers for rescission of a sale and relying only on a prayer for damages. *Rosen v. Mayer*, 494.

Conduct of a minority stockholder, who, after he had made a demand in writing of the corporation for the value of his shares under St. 1903, c. 437, § 44, and while he was seeking to ascertain the real value of the shares, discovered fraud of the majority stockholders lessening the value of the shares, but agreed with them to submit the matter of the appraisal of the value of his shares to certain arbitrators under the statute, was held under the circumstances not to be a binding election to waive his right to maintain a suit in equity to compel an accounting and restitution by the majority stockholders. *Cole v. Wells*, 504.

### EMINENT DOMAIN.

Where land or an interest in land is taken by right of eminent domain, the description in the instrument of taking should be as definite and certain as is necessary for a conveyance of land by a deed. *New York Central Railroad v. Swenson*, 88.

If the language used in an instrument of taking by eminent domain is so ambiguous and obscure as to make uncertain the nature and extent of the taking, the taking will be held to be invalid. *New York Central Railroad v. Swenson*, 88.

If an instrument of taking by right of eminent domain of a certain location by a railroad corporation contains no language to show that a private way which crosses the location is extinguished, the mere facts that, upon the map which the corporation filed with the county commissioners is the statement "This location covers and includes all the land lying between the lines tinted red on said map," and that the "lines tinted red" crossed black lines designated as the lines of the private way, do not show that the private way where it crossed the location was extinguished by the taking. *Ibid*.

The taking by the city of Newburyport under St. 1908, c. 403, for the purposes of its water supply, by an instrument in writing filed and recorded in the registry of deeds, of "The right to flow to an elevation not exceeding twenty feet above mean low water in the Merrimac River such of the lands [described] as will be flowed as a result of the maintenance of such a dam" upon the above described parcel of land gives a sufficiently accurate description of the right to flow to make the taking valid. *Lunt v. Newburyport*, 48.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

#### EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.

See also WORKMEN'S COMPENSATION ACT.

#### EQUITABLE LIEN.

See LIEN, *Equitable*.

#### EQUITY JURISDICTION.

##### *No Supervisory Jurisdiction over Courts of Law.*

A court of equity has no supervisory jurisdiction over courts at law. *Nesson v. Gilson*, 212.

##### *Legislative Control.*

The power of courts to afford relief by injunction cannot be impaired by the Legislature in such a way as to prevent its use in favor of one property owner when it is preserved for the benefit of other property owners. *Bogni v. Perotti*, 152.

##### *No Jurisdiction by Consent.*

The consent of the parties to a suit in equity cannot confer jurisdiction of the subject matter of the suit upon the court, where it otherwise does not exist. *Hill v. Moors*, 163.

The question, whether a court has jurisdiction to entertain a suit in equity, will be considered by the court on its own motion although it was not raised by any party to the suit. *Ibid*.

*Laches.*

Plaintiff's rights in a suit in equity by a stockholder under St. 1903, c. 437, § 44, after the stockholders against his vote had changed the nature of the corporation's business, were not precluded by the facts that, throughout the greater part of the period from the organization of the corporation in 1864 to the date of the vote referred to, the directors had done the things specified in the vote, had reported their doings to the stockholders and the stockholders had made no objection. *Teale v. Rockport Granite Co.* 20.

*Statute of Limitations.*

A suit in equity by one, who, under an agreement in writing with the owner of certain land providing for its purchase and for payment therefor in instalments, had entered upon the land and had made extensive improvements, against the owner and one who, with full knowledge of the agreement and of expenditures made by the plaintiff toward the purchase price and for improvements, had purchased the land from the owner and had dispossessed the plaintiff, was held to be barred by the statute of limitations. *Young v. Walker*, 491.

*Estoppel.*

Plaintiff's rights in a suit in equity by a stockholder under St. 1903, c. 437, § 44, after the stockholders against his vote had changed the nature of the corporation's business, were not affected by the fact that, while his suit in equity was pending, the corporation tendered to him and he received a dividend on his shares of stock. *Teale v. Rockport Granite Co.* 20.

*For an Accounting.*

In a suit in equity, by an administrator *de bonis non* of an estate against a bank in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, where it appeared that the bank had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate, it was held that the defendant was not bound to account for the amount of checks on the account of the estate deposited to the administrator's personal account on the days following certain overdrafts where other checks drawn upon other sources more than sufficient in amount to take up the overdraft were deposited on the same day. *Allen v. Fourth National Bank*, 239.

In the same suit it was held that under the circumstances the defendant was not bound to account to the plaintiff for the amount of certain checks on the account of the estate which made possible certification of checks on the administrator's personal account. *Ibid.*

Nor for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection. *Ibid.*

An action of tort or contract, with a declaration containing counts for the conversion of money and for money had and received and upon an account annexed, may be maintained although the plaintiff, upon the same facts, might have relief in equity for the termination of a trust and an accounting. *Flye v. Hall*, 528.

Accounting between partners, see PARTNERSHIP.

*Bill for Instructions.*

A trustee cannot maintain a bill in equity for instructions upon a question relating to the past administration of his trust. *Hill v. Moors*, 163.

Where on a bill by an administrator for instructions the plaintiff is ordered to pay a share of the residue of an estate to the legal representative of a deceased residuary legatee, and where there is no dispute as to such share nor as to the persons entitled to receive it, it may be ordered in the alternative that the payment of such share may be made directly to the children of such deceased legatee without the appointment of an administrator to receive and distribute it. *Dallinger v. Merrill*, 534.

*Specific Performance of Contracts.*

Provisions of a contract for the sale and purchase of a parcel of land which were such that the buyer, when, after he had taken possession under his deed and had made improvements, he found that a town rightfully claimed rights in a natural watercourse across the rear of the parcel, could not maintain a suit in equity to enforce the specific performance of the contract of purchase, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the stipulated sole remedy in that case being a rescission of the contract. *Lewenberg v. Johnson*, 297.

A suit in equity by one, who, under an agreement in writing with the owner of certain land providing for its purchase and for payment therefor in instalments, had entered upon the land and had made extensive improvements, against the owner and one who, with full knowledge of the agreement and of expenditures made by the plaintiff toward the purchase price and for improvements, had purchased the land from the owner and had dispossessed the plaintiff, was held to be barred by the statute of limitations. *Young v. Walker*, 491.

*Trusts.*

See TRUSTS.

*To compel Transfer of Shares to Pledges.*

Deposit by the owner of shares in a foreign corporation, with a stockbroker as additional margin to secure his account, of his certificate with his signature on the back but not to a power of attorney to transfer and without compliance, with the requirements of the foreign law in regard to transfers of shares, was held not sufficient to enable a trust company to whom the stockbroker had pledged the shares to maintain a bill in equity to compel a transfer of the shares to it, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

*To compel Issue of Certificate of Shares by Corporation.*

By reason of an instrument of assignment by a trust company which in good faith had taken as collateral security for a loan an instrument purporting to be a certificate for shares in a street railway corporation which instrument was identified as part of an attempted fraudulent over-issue of stock of the street railway corporation, it was held that a right of action of the trust company against the street railway corporation based on the ground that the street railway corporation was estopped to deny that the trust company was a holder of its shares, passed to the assignees and no longer belonged to the trust company. *Smith v. Worcester & Southbridge Street Railway*, 564.

And it was held that the trust company could not maintain a suit in equity to compel the street railway corporation to issue to it a new certificate for the number of shares named in the instrument. *Ibid*.

In a suit in equity brought by the trust company against the street railway corporation to compel the issuing of a new certificate to the plaintiff for the number of shares of stock of the street railway corporation named in the instrument described above, it was held that on the evidence the judge was warranted in construing the assignment to include the claim. *Ibid*.

*To enforce Equitable Lien.*

Circumstances under which an equitable lien created by an assignment of "money to be received" under an uncompleted contract with the United States for the manufacture and delivery of certain navy supplies, was enforceable in a suit in equity. *Jennings v. Whitney*, 138.

*Equitable Replevin.*

A plaintiff in equity, who alleges that he is entitled to become the holder of certain negotiable bonds and who wrongly has brought a bill to enforce the collection of the bonds which are not in his possession, cannot obtain the relief he seeks by amending his bill into a bill for equitable replevin, because, if the court should take jurisdiction of the bill as one of equitable replevin, it could not retain jurisdiction for the purpose of compelling the defendant to pay the bonds, such relief not being an incident to a bill of equitable replevin. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

*To enjoin Interference with Right to Work.*

The provisions contained in St. 1914, c. 778, § 2, declaring that "in construing this act" the right to labor and to make and modify contracts to work "shall be held and construed to be a personal and not a property right," and prohibiting the granting of an injunction to enforce such a right "where no irreparable damage is about to be committed upon the property or property right of either" the employee or the employer, are unconstitutional and void. *Bogni v. Perotti*, 152.

*To enforce Rights of Stockholder in Corporation.*

If against the vote of a stockholder in a corporation the other stockholders have voted to change the nature of its business, and he has made the

demand in writing specified in St. 1903, c. 437, § 44, and, when the corporation refused payment for his stock, has appointed an appraiser and has notified the corporation, which refuses to appoint an appraiser, he by a bill in equity may compel the appointment of such an appraiser and compliance by the corporation with the provisions of the statute. *Teele v. Rockport Granite Co.* 20.

The right given by St. 1903, c. 437, § 44, to such a minority stockholder under such circumstances to compel the corporation to pay him the value of his shares, and his right, pending such payment to him, to compel an accounting by the majority stockholders who, while in control of the corporation, have misappropriated its property and manipulated and falsified its accounts so as to conceal their fraud and to make it difficult if not impossible to ascertain the true state of the corporation's assets, are not inconsistent but are concurrent. *Cole v. Wells*, 504.

Conduct of such a minority stockholder, who, after he had made a demand in writing of the corporation for the value of his shares under St. 1903, c. 437, § 44, and while he was seeking to ascertain the real value of the shares, discovered fraud of the majority stockholders lessening the value of the shares, but agreed with them to submit the matter of the appraisal of the value of his shares to certain arbitrators under the statute, was held under the circumstances not to be a binding election to waive his right to maintain a suit in equity to compel an accounting and restitution by the majority stockholders. *Ibid.*

Right under certain circumstances of a minority stockholder to maintain a suit in equity in his own behalf and in behalf of the corporation to set aside a transfer by the majority stockholders and officers to themselves as trustees for their own benefit of all the corporation's property, and to compel an accounting and restoration by the majority stockholders. *Ibid.*

Until such a minority stockholder has been paid the value of his shares, determined as provided by the statute, he still is a stockholder and has a right to pursue in equity his rights as such minority stockholder in behalf of the corporation against the majority stockholders to compel an accounting and restitution by them. *Ibid.*

#### *To reform Instrument in Writing.*

Provisions of a contract for the sale and purchase of a parcel of land which were such that the buyer, when, after he had taken possession under his deed and had made improvements, he found that a town rightfully claimed rights in a natural watercourse across the rear of the parcel, could not maintain a suit in equity, the defendant never having agreed to convey the land if it should be found to be subject to a permanent incumbrance, the sole remedy in that case being a rescission of the contract. *Levenberg v. Johnson*, 297.

#### *To set aside Deed fraudulent as to Creditors.*

In a suit in equity by an administrator *de bonis non* of the estate of a married woman who conveyed to her sister certain real estate which left her insolvent, to obtain the satisfaction of his individual claim out of such real estate it was held that, although the facts showed that the conveyance was made



*Equity Jurisdiction (continued).*

upon an agreement of the defendant to support the grantor and her husband, which was a valuable consideration so that the deed was good between the parties, the conveyance was fraudulent in law as against creditors and might be avoided by them. *Rolfe v. Clarke*, 407.

Accordingly in the case described above it was ordered that, unless the defendant within a time limited should pay the individual claim of the plaintiff as a creditor and should pay also the expenses of administration and the costs of suit incurred by the plaintiff, the real estate should be sold under a license previously granted by the Probate Court and the proceeds applied to the satisfaction of the plaintiff's claim, any surplus being paid to the defendant. *Ibid.*

In the case described above it appeared that the defendant, after the conveyance of the real estate to her, received from the net income produced by it a sum of money sufficient to repay her for all expenses incurred in the support of the grantor and her husband, so that it was not necessary to consider whether, if this had been otherwise, she would have been entitled to be reimbursed for such expenses out of the proceeds from the sale of the real estate. *Ibid.*

*To have Note and Mortgage declared Void for Duress.*

Conduct of a woman, who under duress executed and delivered a note and a mortgage securing it in consideration of a return to her of documents which might have been the basis of criminal proceedings against her husband and also of the transfer to her of several mortgages, upon which, it was held, she must be taken to have ratified and confirmed the note and mortgage so that she was unable to maintain a suit in equity to have them declared void and to enjoin the foreclosure of the mortgage. *Webb v. Lothrop*, 103.

*To reach and apply Equitable Assets.*

The "property, right, title or interest, legal or equitable, of a debtor" which can be reached and applied by a suit in equity under R. L. c. 159, § 3, cl. 7, are those in existence when the suit is brought. *Hopedale Manuf. Co. v. Clinton Cotton Mills*, 193.

A suit in equity cannot be maintained against a foreign corporation having no usual place of business in this Commonwealth and a firm with which the corporation had a contract of agency for the sale of its goods to reach and apply alleged assets of the corporation where it appears only that the firm, at the time of service of process upon them, under an existing contract with the corporation might at some future time owe money to the corporation. *Ibid.*

*To enforce Collection of Negotiable Instrument.*

A bill in equity cannot be maintained to enforce the collection of certain negotiable bonds of which the plaintiff alleges that he was deprived unjustly by the defendant who procured possession of them by fraud and deceit, because a suit to collect a negotiable instrument can be maintained only by its holder. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

Such a suit cannot be amended into a suit for equitable replevin, because, if the court should take jurisdiction of the bill as one of equitable replevin,

it could not retain jurisdiction for the purpose of compelling the defendant to pay the bonds, such relief not being an incident to a bill of equitable replevin. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

*For Ratification of Acts of Trustees.*

A suit in equity cannot be maintained by a trustee to establish the validity of the titles to certain parcels of real estate conveyed by him to various persons who are not parties to the suit, and to have the deeds which he gave as trustee and his acts as trustee ratified and confirmed. *Hill v. Moors*, 163.

*Suit to redeem from Tax Sale.*

Suit to redeem from a tax sale was maintained because the purchaser, a non-resident, had failed to comply with St. 1909, c. 490, Part II, § 46, as to notice and appointment of an agent and the general equities favored the plaintiff. *Glazier v. Everett*, 184.

Trustee, appointed by methods provided for in a declaration of trust, was held to succeed under the provision of R. L. c. 147, § 6, to a right to maintain a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem the land from a sale made after the death of the original trustee for the collection of a tax assessed before the property was conveyed to the original trustee. *Ibid*.

Proper decree for the plaintiff in such a suit where it appears that since the tax sale the land has been taken by eminent domain by the town for water supply purposes and that a claim for damages resulting from such taking is unsatisfied. *Ibid*.

*To enjoin Enforcement of Judgment at Law.*

In a suit in equity brought to restrain the enforcement of a judgment at law, which was entered after two trials on the merits and after the merits had been considered for a third time on a petition for a writ of review, which was denied, where the only new matter alleged in the bill was disposed of completely by the findings of a master and was shown to be without foundation, it was ordered that the bill be dismissed with costs. *Nesson v. Gilson*, 212.

*To restrain Unlawful Expenditure by Municipality.*

It was held that, under circumstances stated, no illegal expenditure was proposed, and therefore that a bill in equity under R. L. c. 25, § 100, by ten taxable inhabitants of the city of Medford to restrain the mayor and city treasurer of that city from borrowing money to construct a city hall should be dismissed. *Fuller v. Mayor of Medford*, 176.

*To enjoin Private Nuisance.*

A suit in equity may be maintained to enjoin the erection and maintenance of a garage in the city of Boston on land adjoining that of the plaintiff with-

*Equity Jurisdiction (continued).*

out lawful authority under St. 1913, c. 577, as amended by St. 1914, c. 119, upon showing special damage suffered by the plaintiff by reason of noise, confusion, noisome odors and the storing of large quantities of inflammable and explosive material, although by the acts complained of a public nuisance also was created. *Wright v. Lyons*, 167.

*Administration cy pres.*

Circumstances surrounding a trust created by a deed of land on Bromfield Street in Boston in 1806 for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land, and effect of a sale of the land and a moving of the religious society which formerly had occupied it were held to present no occasion for an application of the doctrine of *cy pres*. *Crawford v. Nies*, 474.

*Retention of Suit for Damages Only.*

Under the circumstances, where after a suit for the rescission of a sale for fraud had pended for ten months, the plaintiff elected to rely only on his prayer for damages, the court properly retained jurisdiction of the suit. *Rosen v. Mayer*, 494.

*Concurrent Remedies in Equity and at Law.*

An action of tort or contract, with a declaration containing counts for the conversion of money and for money had and received and upon an account annexed, may be maintained although the plaintiff, upon the same facts, might have relief in a suit in equity for the termination of a trust and an accounting. *Flye v. Hall*, 528.

## EQUITY PLEADING AND PRACTICE.

*Service upon Foreign Corporation.*

Facts relating to a resident passenger agent, which were held to warrant a finding that a railroad corporation organized under the laws of another State was engaged in business in as well as soliciting business in this Commonwealth, so that under St. 1913, c. 257, such corporation might be served with process in the manner provided for service in actions against domestic corporations. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

*Parties.*

In a proceeding under St. 1913, c. 784, § 28, by the public service commission to enforce an order directing a telegraph company to cease certain acts of discrimination, where the company attempted to justify its conduct by reason of a contract which it had with the New York Stock Exchange, it was held that it was not necessary that the New York Stock Exchange or its officers or members should be made parties. *Western Union Telegraph Co. v. Foster*, 365.

A bill in equity cannot be maintained to enforce the collection of certain

negotiable bonds of which the plaintiff alleges that he was deprived unjustly by the defendant who procured possession of them by fraud and deceit, because a suit to collect a negotiable instrument can be maintained only by its holder. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

#### Bill.

The scope of a bill in equity is to be determined by its allegations and not by its special prayers for relief. *Cole v. Wells*, 504.

A plaintiff in equity, who alleges that he is entitled to become the holder of certain negotiable bonds and who wrongly has brought a bill to enforce the collection of the bonds which are not in his possession cannot obtain the relief he seeks by amending his bill into a bill for equitable replevin, because, if the court should take jurisdiction of the bill as one of equitable replevin, it could not retain jurisdiction for the purpose of compelling the defendant to pay the bonds, such relief not being an incident to a bill of equitable replevin. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

#### Cross Bill.

Whether a cross bill, filed in a suit in equity after a decision and rescript of this court determining issues of law raised by the original bill, which sought an adjudication of the rights of the plaintiffs in the cross bill, as four of nine trustees under a deed of land, in the proceeds of a sale of the land made under a decree of court, can be treated as in the nature of a bill of review of the decree of sale, was not determined in this suit, this court holding that, there being no evidence of accident, fraud or mistake affecting the decree and some of such plaintiffs, acting under advice of counsel, having sought the decree, the equities were against the plaintiffs and no reasonable ground for vacation of the decree was shown. *Crawford v. Nies*, 474.

#### Plea.

The question, whether a court has jurisdiction to entertain a suit in equity, will be considered by the court on its own motion although it was not raised by any party to the suit. *Hill v. Moors*, 163.

A foreign corporation, which in a suit in equity has filed a plea to the jurisdiction of the court denying that it has been served with process lawfully, was held not to have waived this plea by taking part in an argument upon the question of whether a preliminary injunction ought to issue. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

If a defendant files an affirmative plea to a bill in equity and the plaintiff files no replication thereto, the facts well alleged in the plea are admitted by the plaintiff and the sole question on the plea is, whether as a matter of law, upon the facts therein well alleged and the facts well alleged in the bill and not denied in the plea, the suit can be maintained. *Cole v. Wells*, 504.

#### Waiver of Plea.

A foreign corporation, which in a suit in equity has filed a plea to the jurisdiction of the court denying that it has been served with process lawfully, was held under the circumstances not to have waived this plea by taking

part in an argument upon the question of whether a preliminary injunction ought to issue. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

#### *Demurrer.*

If the plaintiff in a suit in equity appeals from an interlocutory decree sustaining a demurrer to the bill on the ground of multifariousness and afterwards by leave of court amends the bill so that the objection of multifariousness is removed, he waives his right of appeal. *Cole v. Wells*, 504.

#### *Amendment.*

St. 1905, c. 263, did not take away the power of the Supreme Judicial Court under R. L. c. 173, § 52, to allow an amendment changing a suit in equity in that court into an action at law. *Kerr v. Whitney*, 120.

If the plaintiff in a suit in equity appeals from an interlocutory decree sustaining a demurrer to the bill on the ground of multifariousness and afterwards by leave of court amends the bill so that the objection of multifariousness is removed, he waives his right of appeal. *Cole v. Wells*, 504.

A plaintiff in equity, who alleges that he is entitled to become the holder of certain negotiable bonds and who wrongly has brought a bill to enforce the collection of the bonds which are not in his possession, cannot obtain the relief he seeks by amending his bill into a bill for equitable replevin, because, if the court should take jurisdiction of the bill as one of equitable replevin, it could not retain jurisdiction for the purpose of compelling the defendant to pay the bonds, such relief not being an incident to a bill of equitable replevin. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

#### *Master.*

##### **Powers and duties.**

Where by an interlocutory decree a suit in equity has been referred to a master "to find the facts and to report the same to the court," the duty of the master is performed by a statement of his conclusions with such narration of the facts as may be necessary to enable the court to comprehend the steps by which his conclusions have been reached and to decide whether they are correct in law. *Smith v. Lloyd*, 173.

The intention and effect of the rule to the master quoted above is to leave to his final determination the decision of all matters of fact. *Ibid.*

Under such a rule the master is required to report evidence only so far as is necessary to present intelligibly and fairly any question of law raised before him at the hearing. *Ibid.*

Under such a rule the master is not required to report all the evidence even by a request to rule that one of the parties is not entitled to prevail on all the evidence. *Ibid.*

Where, under such a rule, after the master has submitted his draft report, requests for rulings or exceptions raise questions whether certain findings are supported by the evidence, this does not require as a matter of right that the master should report substantial parts of the evidence. *Ibid.*

Scope of duties of a master, appointed in a suit for an accounting among

partners "to state the accounts in accordance with the terms of the partnership." *Hurter v. Larrabee*, 218.

Under R. L. c. 162, § 15, which provides that probate appeals "shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases," a reference on a probate appeal to an auditor "to hear the parties and their evidence, to find the facts, and report the same to the court" will be treated as a reference to a master and the auditor's report will be treated as a master's report. *Chapman v. Chapman*, 427.

#### Recommittal of report.

A motion to recommit the report of a master made under such a rule for further findings and the report of parts of the evidence is addressed to the discretion of the trial judge, and ordinarily such a motion is not granted in the absence of some special reason. *Smith v. Lloyd*, 173.

A motion to recommit a master's report, in order that he may report the evidence that was given in previous trials at law between the same parties and may make findings on questions that were decided or involved in those trials and are not material to the suit in equity, must be denied. *Nesson v. Gilson*, 212.

#### Exceptions to report.

In a suit in equity exceptions to a master's report based on objections that certain findings of the master were not warranted by the evidence or that certain findings were not made by the master, if the evidence on which the master acted is not reported, must be overruled. *Nesson v. Gilson*, 212.

#### *Retention of Suit for Damages Only.*

Under the circumstances, where after a suit for rescission of a sale for fraud had pended for ten months, the plaintiff elected to rely only on his prayer for damages, the court retained jurisdiction. *Rosen v. Mayer*, 494.

#### *Motion for Rehearing.*

The decision of the judge, who heard a suit in a bill in equity upon a plea to the jurisdiction, denying a motion by the plaintiff, made after the close of the hearing, to be permitted to introduce further evidence alleged to have been discovered since the hearing bearing on the issues raised by the plea, was held to have been discretionary and not revisable on appeal. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

#### *Decree.*

Proper decree for the plaintiff in a suit in equity to redeem land from a tax sale, where it appeared that since the tax sale the land had been taken by eminent domain for water supply purposes and that a claim for damages resulting from such taking was unsatisfied. *Glazier v. Everett*, 184.

In a suit in equity by an administrator *de bonis non* against the grantee of certain real estate conveyed by the intestate in fraud of the plaintiff as an individual creditor, to have the conveyance set aside, it was ordered that, unless the defendant within a time limited should pay the individual claim

of the plaintiff as a creditor and should pay also the expenses of administration and the costs of suit incurred by the plaintiff, the real estate should be sold under a license previously granted by the Probate Court and the proceeds applied to the satisfaction of the plaintiff's claim, any surplus being paid to the defendant. *Rolfe v. Clarke*, 407.

Where on a bill by an administrator for instructions the plaintiff is ordered to pay a share of the residue of an estate to the legal representative of a deceased legatee, and where there is no dispute as to such share nor as to the persons entitled to receive it, it may be ordered in the alternative that the payment of such share may be made directly to the children of such deceased legatee without the appointment of an administrator to receive and distribute it. *Dallinger v. Merrill*, 534.

In a suit in equity, where it is plain that the plaintiff has mistaken his remedy, if he has any, the better practice is, even where an absolute decree dismissing the bill would not be a bar to any proper action or suit to enforce the rights of the plaintiff in the matters complained of, to provide in the decree that the bill is dismissed without prejudice, and such an order was made in the present case. *Lloyd v. Imperial Machine Stamping & Welding Co.* 574.

#### *Appeal.*

Where at the hearing of a suit in equity the evidence was taken by a commissioner, the plaintiff, on an appeal from a decree dismissing the bill, may rely upon contentions not made before the trial judge. *Webb v. Lothrop*, 103.

On an appeal, in a suit to enjoin the foreclosure of a mortgage, from a decree dismissing the bill, on all the evidence it was held that the plaintiff had failed to sustain a contention that the note and mortgage were void because their consideration was the compounding by the defendant of a felony of the plaintiff's husband or the stifling of a criminal prosecution against him. *Ibid.*

The question, whether a court has jurisdiction to entertain a suit in equity, will be considered by the court on its own motion although it was not raised by any party to the suit. *Hill v. Moors*, 163.

On an appeal from a decree for the plaintiff in a suit in equity in the Superior Court under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale, where the evidence was taken by a commissioner but no statement of facts found was made by the judge, this court must review the evidence and decide the case on their own judgment both as to facts and as to law, but the trial judge's findings as to facts upon oral testimony necessarily implied by his disposition of the case are not to be reversed unless plainly wrong. *Glazier v. Everett*, 184.

The decision of the judge, who heard a suit in equity upon a plea to the jurisdiction, denying a motion by the plaintiff, made after the close of the hearing, to be permitted to introduce further evidence alleged to have been discovered since the hearing bearing on the issues raised by the plea, was held to have been discretionary and not revisable on appeal. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

Where in a suit in equity with the assent in writing of the attorneys for the parties a decree is entered containing the recital, "the plaintiff and the defendant . . . severally waiving their rights to appeal therefrom," the

right of appeal is waived under R. L. c. 159, § 34, and there can be no appeal from such a decree. *Tolman v. Tolman*, 501.

If the plaintiff in a suit in equity appeals from an interlocutory decree sustaining a demurrer to the bill on the ground of multifariousness and afterwards by leave of court amends the bill so that the objection of multifariousness is removed, he waives his right of appeal. *Cole v. Wells*, 504.

#### *Waiver of Right to Appeal.*

Where in a suit in equity with the assent in writing of the attorneys for the parties a decree is entered containing the recital, "the plaintiff and the defendant . . . severally waiving their rights to appeal therefrom," the right of appeal is waived under R. L. c. 159, § 34, and there can be no appeal from such a decree. *Tolman v. Tolman*, 501.

If the plaintiff in a suit in equity appeals from an interlocutory decree sustaining a demurrer to the bill on the ground of multifariousness and afterwards by leave of court amends the bill so that the objection of multifariousness is removed, he waives his right of appeal. *Cole v. Wells*, 504.

#### ERROR, WRIT OF.

See WRIT OF ERROR.

#### ESTOPPEL

An estoppel may be established by proof of silence when there was a duty to speak. *D'Almeida v. Boston & Maine Railroad*, 452.

Plaintiff's rights in a suit in equity by a stockholder under St. 1903, c. 437, § 44, after the stockholders against his vote had changed the nature of the corporation's business, were not affected by the fact that, while his suit in equity was pending, the corporation tendered to him and he received a dividend on his shares of stock. *Teale v. Rockport Granite Co.* 20.

Reference in a deed of a lot of land to an alleged private right of way, which, in the absence of any physical indication of the existence of the way, was held not to estop the owner of an adjoining lot later purchased from the same grantor from denying the existence of the way. *Ralph v. Clifford*, 58.

A ward is not estopped to raise an objection to items of expense in his guardian's account on the ground that they were incurred in an appeal from a decree discharging the guardian which the court had no jurisdiction to entertain, merely because at no time during the proceedings where the expenses were incurred, which were long and expensive, did the ward object that the guardian's conduct in appealing was legally unwarranted or that the court lacked jurisdiction to entertain the appeal. *Ensign v. Faxon*, 145.

Deposit by the owner of shares in a foreign corporation, with a stockbroker as additional margin to secure his account, of his certificate with his signature on the back but not to a power of attorney to transfer and without compliance with the requirements of the foreign law in regard to transfers of shares, was held not sufficient to enable a trust company to whom the stockbroker had pledged the shares to maintain a bill in equity to compel



*Estoppel (continued).*

a transfer of shares to it, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

Where, with the acquiescence of the plaintiff, an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

By the enactment of St. 1913, c. 784, the Legislature waived whatever conditions or contracts were made by the appropriate municipal boards, who were public officers, and the street railway corporations in the granting and accepting of the locations, and therefore street railway corporations are not estopped from seeking from the public service commission permission to establish fares which are in excess of those agreed upon in such conditions or contracts. *Arlington Board of Survey v. Bay State Street Railway*, 463.

## EVIDENCE.

### *Judicial Notice.*

The court will take judicial notice that a person, who signed as "acting comptroller of the currency" a certificate bearing the seal of the comptroller of the currency of the United States and asserting the truth of copies of originals on file in that office, held that office and will assume that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller and was therefore at the time acting comptroller. *Weitzel v. Brown*, 190.

### *Presumptions and Burden of Proof.*

Applications of the doctrine, *res ipsa loquitur*. See appropriate subtitle under NEGLIGENCE.

Proof of the performance of a condition precedent of a policy of life insurance is not affected by St. 1907, c. 576, § 21. *Fondi v. Boston Mutual Life Ins. Co.* 6.

In an action upon a policy of life insurance containing a provision which reads, "Conditions. Provided, however, that no obligation is assumed by said Company prior to the date hereof, nor unless on said date the insured is alive, in sound health . . .," proof that on the date of the policy the insured was in sound health is a condition precedent to recovery, and the burden of proving compliance with that condition rests upon the plaintiff. *Ibid.*

On an exception to the exclusion of a question to a witness the burden is on the excepting party to show that the answer to the question, as the judge understood the question and as he had a right to understand it, was competent. *Crane Co. v. Pension*, 135.

The findings of the auditor in an action of contract against a stockbroker

- under R. L. c. 99, § 4, being the only evidence upon the issue to which they related, a verdict was held properly to have been ordered for the defendant because as a matter of law he had sustained the burden of proving under R. L. c. 99, § 4, that all the purchases and sales upon orders placed with him by the plaintiff were "actual." *Matthys v. Hornblower*, 248.
- St. 1911, c. 370, providing that the deed of a collector of taxes conveying land sold for non-payment of taxes, if recorded within thirty days, "shall be *prima facie* evidence of all facts essential to its validity," establishes a rule of procedure which applies to deeds executed in pursuance of sales made before as well as of those made after its enactment. *Welch v. Haley*, 261.
- Exception to the exclusion of evidence was overruled because the excepting party failed to state in its bill of exceptions the evidence which, it contended, raised the issue to which the evidence excluded was relevant, and the reason given for such failure, that as the issue was left to the jury it was to be presumed that there was some evidence on both sides, did not help the court to determine the relevancy of the evidence excluded. *Doherty v. Phoenix Ins. Co.* 310.
- Charge of a judge, in an action upon a policy of accident insurance, that "All parties to a contract, whatsoever contract it may be, who sign it or accept it, are presumed to know the terms thereof; but this presumption is not conclusive," as to which it was held that in the connection in which it was used and must have been understood, the statement of the judge was correct. *Collins v. Casualty Co. of America*, 327.
- In an action for personal injuries sustained by the plaintiff's intestate by reason of one of the rungs of a ladder coming out or breaking at one end when the intestate was going up the ladder, evidence of statements by him to his physician ten months after the accident as to excessive use of intoxicating liquor and tobacco was held not to be competent upon the issue of liability, there being no presumption that such habit existed at any certain previous point of time. *Ceresola v. Joseph F. Paul Co.* 395.
- Where in cross-examination a plaintiff testifies that her answers to interrogatories propounded under the statute, which were different from her statements made under direct examination, are correct and absolutely true notwithstanding anything that she has testified to on the witness stand, this is not to be treated as a mere instance of conflicting or inconsistent statements made upon cross-examination, and the plaintiff is to be bound by the statement last given as the truth. *Sullivan v. Boston Elevated Railway*, 405.
- Mere silence or failure by a buyer of goods to inform their seller of facts relating to the buyer's financial responsibility, which for his own protection the seller ought to know, does not constitute fraud which will enable the seller to avoid the sale and maintain an action of replevin to compel a return of the goods. *Phinney v. Friedman*, 531.
- It is not justifiable to found an inference nor an argument upon a palpable verbal slip made by a witness in one of his answers upon his cross-examination. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.
- Circumstances surrounding the finding of the dead body of a plumber's assistant five minutes after he was seen driving a horse and wagon of his employer were held to leave the cause of his falling from the wagon, if he did fall, purely a matter of conjecture so that there was no evidence on which it could be found that the death of the employee was the result of an

Evidence (*continued*).

injury arising out of the employment within the meaning of St. 1911, c. 751, Part II, § 1. *Sanderson's Case*, 558.

Good faith of apportionment commissioners was presumed. *Attorney General v. Apportionment Commissioners*, 598.

*Matter of Conjecture.*

Circumstances surrounding the finding of the dead body of a plumber's assistant five minutes after he was seen driving a horse and wagon of his employer were held to leave the cause of his falling from the wagon, if he did fall, purely a matter of conjecture so that there was no evidence on which it could be found that the death of the employee was the result of an injury arising out of his employment within the meaning of St. 1911, c. 751, Part II, § 1. *Sanderson's Case*, 558.

*Inference.*

Where an electric street railway car suddenly moves backward for a considerable distance just as passengers have entered it and then without a substantial interval of time moves forward, and where both motions are of such violence as to throw a passenger each time against some part of the car, this is so contrary to common experience in the ordinary operation of street railway cars as to warrant an inference of negligence in the operation of the car. *Sullivan v. Boston Elevated Railway*, 405.

In an action for personal injuries caused by a horse of the defendant when ridden by a minor son of the defendant, where there was no evidence that the defendant's son was acting as the servant or agent of his father and the defendant did not call his son as a witness, it was held that no inference could be drawn against the defendant from his failure to call his son as a witness when there was nothing for him to refute. *Poirier v. Terceiro*, 435.

It is not justifiable to found an inference nor an argument upon a palpable verbal slip made by a witness in one of his answers upon his cross-examination. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

*Admissions.*

Comment, by a judge in his charge to the jury, as to inferences that might be drawn from the absence of an employee of the defendant as a witness, as to which it was held that, while the judge well might have omitted the instruction, it could not be held to have been erroneous. *Robinson v. Doe*, 319.

At the trial of an action by the administrator of the estate of a mother against her daughter for money had and received, where the plaintiff contended that the mother gave to the daughter sums of money at various times to be used for the mother's support and that the daughter was retaining a portion of such money that had not been expended, it was held that an unsigned statement of the account between the parties which, according to some of the evidence, was handed by the defendant to the plaintiff, was admissible in evidence as an admission by the defendant, although she denied having given it to the plaintiff. *Flye v. Hall*, 528.

Also, testimony of the defendant as a witness in a proceeding in the Probate Court, which tended to contradict her testimony at the current trial, was admissible in evidence. *Flye v. Hall*, 528.

Failure to call witnesses, see *post*.

#### *Opinion: Experts.*

In an action, where the genuineness of the signature of a deceased person was a material issue, this court was of opinion that testimony of a certain witness that the signature in question was genuine, should have been excluded on the ground that the witness did not have sufficient knowledge to qualify him as a witness on the subject, but under the circumstances it was held that the error had not affected injuriously the substantial rights of the adverse party and that therefore under St. 1913, c. 716, § 1, the exception to the admission of the evidence should be overruled. *Noyes v. Noyes*, 125.

In the same case this court overruled an exception to the admission of testimony that the signature was genuine by another witness, who had greater familiarity with the signatures of the deceased, although the court was of opinion that it would have been a wiser exercise of discretion not to permit him to testify. *Ibid*.

Determination, at the trial of an action against a corporation operating a street railway for causing the death of a passenger, of the meaning of the words "sharp curves," in a rule of the defendant requiring motormen in going round "sharp curves" not to run over four miles an hour, was held not to be a proper subject for inquiry of an expert witness, but to be understood by the jury according to their common and accepted usage and not in a mathematical or scientific sense. *Halloran v. Boston Elevated Railway*, 280.

#### *Res Gestae.*

Evidence, at the trial of an action for personal injuries caused by the plaintiff being struck by a missile thrown by an employee of the proprietors of a circus who, while pulling up the stakes of the circus tent, was attempting to drive away a crowd of boys, that the employee in driving the boys away said, "Get to . . . out of here" and made other similar remarks, was held to be admissible as evidence of statements accompanying and explaining his acts. *Robinson v. Doe*, 319.

#### *Dying Declarations.*

At the trial of an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, whose death resulted, a dying declaration made by the woman, offered in evidence under R. L. c. 175, § 65, is not rendered inadmissible by the fact that, at its close, with her right hand held raised, supported by one of her attending physicians, she repeated after another physician the words, "I say this realizing I am about to die and this is true, so help me God." *Commonwealth v. Turner*, 229.

Contradictory statements, in a dying declaration by a woman under such circumstances, as to the name of the person responsible for her pregnancy

*Evidence (continued).*

affect the weight only and not the competency or admissibility of the declaration as evidence. *Commonwealth v. Turner*, 229.

### *Best Evidence.*

Proper exclusion, as evidence on the issue, whether one insured was in sound health at the date of the policy, of a copy of a card kept by the State board of health but not as a public record. *Fondi v. Boston Mutual Life Ins. Co.* 6.

### *Remoteness.*

In a suit in equity, one of the issues to be heard by a master was the extent of indebtedness between the plaintiff's husband and the defendant, and, the master having found that the course of dealing between the plaintiff's husband and the defendant had been such that there was an implied waiver of the necessity of demand, notice or protest, certain evidence offered by the plaintiff as to a custom between the same parties in their dealings with mortgages similar to those in issue in this case was held properly to have been excluded, it not appearing to what period of time the evidence referred. *Webb v. Lothrop*, 103.

In an action against a corporation operating a street railway for causing the death of a passenger on a car of the defendant who was thrown from the car when it was entering upon a curve, evidence offered by the defendant to show that the curve was constructed according to recommendations contained in a certain handbook so that there would be a minimum of jerk and jolt was held properly to have been excluded as too remote. *Halloran v. Boston Elevated Railway*, 280.

In an action for personal injuries sustained by the plaintiff's intestate by reason of one of the rungs of a ladder coming out or breaking at one end when the intestate was going up the ladder, evidence of statements by him to his physician ten months after the accident as to excessive use of intoxicating liquor and tobacco was held not to be competent upon the issue of liability, there being no presumption that such habit existed at any certain previous point of time. *Ceresola v. Joseph F. Paul Co.* 395.

### *Competency.*

On an exception to the exclusion of a question to a witness the burden is on the excepting party to show that the answer to the question, as the judge understood the question and as he had a right to understand it, was competent. *Crane Co. v. Pension*, 135.

Where at the trial of an indictment for larceny by false pretences in procuring money by false representations as to the genuineness of indorsements on a note, the defendant admits that all the handwriting on the note is his own, but contends that he was authorized by the persons whose names were thereon to use their names, evidence is admissible to show that the defendant attempted to imitate the handwriting of such persons, such evidence being competent to show a guilty purpose to deceive and defraud, and therefore being relevant. *Commonwealth v. Carver*, 42.

In the same case it was held, that one of the persons whose name was on the

note was a competent witness to testify as to whether the signature purporting to be his looked like his handwriting. *Commonwealth v. Carver*, 42.

At the trial together of cross actions of contract between a lumberman and a lumber dealer upon a contract in writing for the sawing, piling and sale of certain lumber, where the contract required measurements by the lumberman, which were to be recorded on the lumber, and measurements by the dealer by which adjustments were to be made, evidence offered by the dealer of measurements made by purchasers of the lumber from him to the effect that the measurements marked thereon by the lumberman were too large was held to be incompetent. *Sheehan v. Eaton*, 82.

At the same trial, evidence offered by the dealer as to the result of a tally taken by him, which tended to show that the total of the measurements recorded by the lumberman, 748,831 feet, was about 50,000 feet in excess of the tally, was held to have been admissible because it tended to show a palpable mathematical error by the lumberman in adding his measurements. *Ibid*.

Where, at the trial of a suit by a railroad corporation to enjoin one claiming a private right of way across the railroad location from using such way, the plaintiff contended that so much of the way as crossed the location was extinguished by the taking of the location and the meaning of the instrument and plan which were filed when the taking of the location was made is an issue, evidence of what the corporation intended by the filing is incompetent, the question being, not what the corporation intended to do, but what it did. *New York Central Railroad v. Swenson*, 88.

In order to show that an assistant cashier in a shop made a certain pencil mark on a payment stamp on a bill to indicate that the acknowledgment of payment was cancelled as having been stamped on the bill by mistake, where such assistant cashier has failed to identify the pencil mark as having been made by her, it is not competent to show that she had made similar marks on other occasions, this having no tendency to show that she made the mark in question. *Crane Co. v. Pension*, 135.

At the trial of an indictment for procuring an abortion, the testimony of a nurse at whose house the deceased went after the illegal operation, who was called by the Commonwealth, was held to be admissible although in direct examination she stated that a doctor who called upon the woman was not the defendant and did not look like him. *Commonwealth v. Turner*, 229.

At such trial, testimony of a police officer is admissible to the effect that, four days after the alleged criminal act of the defendant and two days before the death of the woman, at a time when other evidence showed that the woman was at the house of the nurse, he saw the nurse and the defendant talking together at a point near the defendant's office. *Ibid*.

In an action for causing the death of a passenger on a street railway car, who was thrown from the car as it entered upon a curve, where a previous fracture of the deceased's skull was admitted, evidence that a fractured skull impairs equilibrium, and that habits of alcoholic drinking, which he was shown to have had, still further impair equilibrium was held rightly to have been excluded in the absence of evidence to show that the balance of mind or body of the intestate was less than normal at the time of the accident or that he was under the influence of liquor at that time. *Halloran v. Boston Elevated Railway*, 280.

In the same case the defendant offered to show "the number of cars that would be passing by at this time and the time between the cars." No

Evidence (*continued*).

offer was made to show the number of cars that in fact passed over that street on that day at that time and it was held that exclusion of the evidence was proper. *Halloran v. Boston Elevated Railway*, 280.

In an action of contract to recover commissions and also damages for the breach of an alleged contract to employ the plaintiff as agent for the sale of the defendant's product and the taking of contracts for doing work with such product, it was held that under the circumstances it was error for the presiding judge to exclude the testimony of the defendant's secretary offered by the defendant to show that the authority of the defendant's agent to engage an agent "was limited to an agency for selling the product." *Nelson v. Imperial Water Proof Co. Ltd.* 388.

In an action for personal injuries sustained by the plaintiff's intestate by reason of one of the rungs of a ladder coming out or breaking at one end when the intestate was going up the ladder, evidence of statements by him to his physician ten months after the accident as to excessive use of intoxicating liquor and tobacco was held not to be competent upon the issue of liability, there being no presumption that such habit existed at any certain previous point of time. *Ceresola v. Joseph F. Paul Co.* 395.

On the issue of damages the intestate's statements to the physician in regard to the extent of his daily use of intoxicating liquor and tobacco were held to be material and relevant as tending to show that the intestate's inability to labor was not attributable entirely to his fall from the ladder. *Ibid.*

#### *Relevancy and Materiality.*

At the trial of an indictment for larceny by false pretences in procuring money by false representations as to the genuineness and financial responsibility of indorsements in a note, after a witness in cross-examination has testified in effect that he did not make up his mind to make any loan until the defendant signed the note, the witness properly was permitted to be asked in redirect examination, "whether or not you would have parted with your money . . . if" the defendant "had not made the representations to you." *Commonwealth v. Carter*, 42.

Where, at such trial, the defendant admits that all the handwriting on the note is his own, but contends that he was authorized by the persons whose names were thereon to use their names, evidence is admissible to show that the defendant attempted to imitate the handwriting of such persons, such evidence being competent to show a guilty purpose to deceive and defraud, and therefore being relevant. *Ibid.*

In a suit in equity, one of the issues to be heard by a master was the extent of indebtedness between the plaintiff's husband and the defendant, and, the master having found that the course of dealing between the plaintiff's husband and the defendant had been such that there was an implied waiver of the necessity of demand, notice or protest, certain evidence offered by the plaintiff as to a custom between the same parties in their dealing with mortgages similar to those in issue in this case was held properly to have been excluded, it not appearing that such custom was different from that found by the master, nor what period of time the evidence referred to. *Webb v. Lothrop*, 103.

In an action of contract against a stockbroker under R. L. c. 99, § 4, the plain-

tiff's knowledge or ignorance of how much of the money deposited by him "was put on each security" was held not to be material to the determination of the issue of his intention at the time of the making of the contract or of the issue of the defendant's reasonable cause to believe that the plaintiff had an intention that there should be no actual sale or purchase. *Mathys v. Hornblower*, 248.

In an action for causing the death of a passenger on a street railway car, who was thrown from the car as it entered upon a curve, where a previous fracture of the deceased's skull was admitted, evidence that a fractured skull impairs equilibrium and that habits of alcoholic drinking, which he was shown to have had, still further impair equilibrium was held rightly to have been excluded in the absence of evidence to show that the balance of mind or body of the intestate was less than normal at the time of the accident or that he was under the influence of liquor at that time. *Halloran v. Boston Elevated Railway*, 280.

In the same case the defendant offered to show "the number of cars that would be passing by at this time and the time between the cars." No offer was made to show the number of cars that in fact passed over that street on that day at that time and it was held that exclusion of the evidence was proper. *Ibid.*

On the issue of damages, in an action for personal injuries and death due to a fall from a ladder, statements of the decedent to his physician in regard to the extent of his daily use of intoxicating liquor and tobacco were held to be material and relevant as tending to show that the decedent's inability to labor was not attributable entirely to his fall from the ladder. *Ceresola v. Joseph F. Paul Co.* 395.

Relevant inquiry, at the trial of an action by the administrator of the estate of a mother against her daughter for money had and received where the plaintiff contended that the mother gave the daughter sums of money at various times to be used for the mother's support and that the daughter was retaining a portion of such money that had not been expended, as to certain financial dealings between the parties. *Flye v. Hall*, 528.

#### *Testimony of Accomplice.*

A woman, whose death has been caused by a criminal operation to procure a miscarriage, is not an accomplice to the crime although she voluntarily went to the person who performed the operation and paid him for doing it, and, at the trial of an indictment for the crime under R. L. c. 212, § 15, the defendant may be convicted upon evidence contained in a dying declaration of the woman introduced under R. L. c. 175, § 65, without the introduction of evidence in corroboration of her statements. *Commonwealth v. Turner*, 229.

#### *Certificate of National Comptroller of Currency.*

The court will take judicial notice that a person, who signed as "acting comptroller of the currency" a certificate bearing the seal of the comptroller of the currency of the United States and asserting the truth of copies of originals on file in that office, held that office and will assume that at the date of his certificate he was authorized to exercise the powers and discharge the



*Evidence (continued).*

duties of the comptroller and was therefore at the time acting comptroller. *Weitzel v. Brown*, 190.

Under U. S. Rev. Sts. §§ 178, 327, 884, copies of papers on file in the office of the national comptroller of the currency, certified by his deputy and authenticated by his seal of office, are competent evidence, in an action by a receiver of a national bank to recover the amount of an assessment upon a shareholder, to prove the charter of the bank, its extension, the adjudication of insolvency by the comptroller, the appointment of the plaintiff as receiver, the assessment and the authorizing and directing of the receiver to bring suit for its collection. *Ibid.*

#### *Of Delivery of Deed.*

It seems that a deed, which was acknowledged five months after its date and was recorded eleven months after its acknowledgment, in the absence of other evidence of the time of its delivery, must be taken to have been delivered on the day of its acknowledgment. *Mighill v. Rowley*, 586.

#### *To establish Estoppel.*

An estoppel may be established by proof of silence when there was a duty to speak. *D'Almeida v. Boston & Maine Railroad*, 452.

#### *Of Habit.*

In an action for personal injuries sustained by the plaintiff's intestate by reason of one of the rungs of a ladder coming out or breaking at one end when the intestate was going up the ladder, evidence of statements by him to his physician ten months after the accident as to excessive use of intoxicating liquor and tobacco was held not to be competent upon the issue of liability, there being no presumption that such habit existed at any certain previous point of time. *Ceresola v. Joseph F. Paul Co.* 395.

On the issue of damages the intestate's statements to the physician in regard to the extent of his daily use of intoxicating liquor and tobacco were held to be material and relevant as tending to show that the intestate's inability to labor was not attributable entirely to his fall from the ladder. *Ibid.*

#### *Of Health.*

Proper exclusion, as evidence on the issue, whether one insured was in sound health at the date of the policy, of a copy of a card kept by the State board of health but not as a public record. *Fondi v. Boston Mutual Life Ins. Co.* 6.

#### *Of Intent.*

Where, at the trial of a suit by a railroad corporation to enjoin one claiming a private right of way across the railroad location from using such way, the plaintiff contended that so much of the way as crossed the location was extinguished by the taking of the location and the meaning of the instrument and plan which were filed when the taking of the location was made is an issue, evidence of what the corporation intended by the filing is incom-

petent, the question being, not what the corporation intended to do, but what it did. *New York Central Railroad v. Swenson*, 88.

*Public Record.*

Proper exclusion, as evidence on the issue, whether one insured was in sound health at the date of the policy, of a copy of a card kept by the State board of health but not as a public record. *Fondi v. Boston Mutual Life Ins. Co.* 6.

*Testimony of Witness in another Proceeding.*

Testimony of the defendant as a witness in a proceeding in the Probate Court, which tended to contradict her testimony at the current trial, was admissible in evidence. *Flye v. Hall*, 528.

*As to Signature.*

At the trial of an indictment for larceny in procuring money by false pretences as to the genuineness of signatures upon a promissory note, one of the persons whose name was on the note was a competent witness to testify as to whether the signature purporting to be his looked like his handwriting. *Commonwealth v. Carter*, 42.

*Violation of Rules as Evidence of Negligence.*

In an action against a railroad corporation under the federal employers' liability act for causing the death of a conductor, it was held that certain rules of the defendant introduced by the plaintiff must be construed together. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

In the same case it was held that under such rules it was the duty of a certain engineer, unless he knew that the course adopted by the conductor would bring about a condition of danger, to follow the conductor's orders. *Ibid.*

*Conflicting and Inconsistent Statements.*

Where in cross-examination a plaintiff testifies that her answers to interrogatories propounded under the statute, which were different from her statements made under direct examination, are correct and absolutely true notwithstanding anything that she has testified to on the witness stand, this is not to be treated as a mere instance of conflicting or inconsistent statements made upon cross-examination, and the plaintiff is to be bound by the statement last given as the truth. *Sullivan v. Boston Elevated Railway*, 405.

*Uncontradicted Testimony.*

Jury are not bound to believe uncontradicted testimony. *Soulier v. Fall River Gas Works Co.* 53.

*Failure to call Witness.*

Comment, by a judge in his charge to the jury as to inferences that might be drawn from the absence of an employee of the defendant as a witness,

*Evidence (continued).*

as to which it was held that, while the judge well might have omitted the instruction, it could not be held to have been erroneous. *Robinson v. Doe*, 319.

In an action for personal injuries caused by a horse of the defendant when ridden by a minor son of the defendant, where there was no evidence that the defendant's son was acting as the servant or agent of his father and the defendant did not call his son as a witness, it was held that no inference could be drawn against the defendant from his failure to call his son as a witness when there was nothing for him to refute. *Poirier v. Terceiro*, 435.

At the trial of an action by an employee against his employer for personal injuries alleged to have been caused by a defect in an automobile truck of the defendant, no inference unfavorable to the defendant can be drawn from the fact that he failed to call as witnesses the employees of a garage where the truck was kept, such employees being equally available to the plaintiff. *Card v. Turner Centre Dairying Association*, 525.

## EXCEPTIONS.

To master's report in suit in equity, see appropriate subtitle under EQUITABLE PLEADING AND PRACTICE.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

In criminal trials, see appropriate subtitle under PRACTICE, CRIMINAL.

In disbarment proceedings, see appropriate subtitle under ATTORNEY AT LAW, *Disbarment*.

## EXECUTION.

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for the creditor indorses and signs upon the execution an acknowledgment of the receipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's acknowledgment of satisfaction, and the creditor in an action of contract on the judgment may recover the balance of the debt. *Smith v. Johnson*, 50.

Where, with the acquiescence of the plaintiff, an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

Under R. L. c. 167, § 56, which provides that "Property which has been attached in suits in equity shall be held for thirty days after the right of appeal from a final decree expires," where there is no right of appeal the right to levy execution under an attachment expires thirty days after the decree. *Tolman v. Tolman*, 501.

## EXECUTOR AND ADMINISTRATOR.

In a suit in equity, by an administrator *de bonis non* of an estate against a bank in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, where it appeared that the bank had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate, it was held that the defendant was not bound to account for the amount of checks on the account of the estate deposited to the administrator's personal account on the days following certain overdrafts where other checks, drawn upon other sources more than sufficient in amount to take up the overdrafts, were deposited on the same day. *Allen v. Fourth National Bank*, 239.

In the same suit it was held that under the circumstances the defendant was not bound to account to the plaintiff for the amount of certain checks on the account of the estate which made possible certification of checks on the administrator's personal account. *Ibid*.

Nor for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection. *Ibid*.

Where in a suit in equity by an administrator for instructions the plaintiff is ordered to pay a share of the residue of an estate to the legal representative of a deceased legatee, and where there is no dispute as to such share nor as to the persons entitled to receive it, it may be ordered in the alternative that the payment of such share may be made directly to the children of such deceased legatee without the appointment of an administrator to receive and distribute it. *Dallinger v. Merrill*, 534.

## FALSE PRETENCES.

See LARCENY.

## FIRE.

Insurance against loss by fire, see appropriate subtitle under INSURANCE.

## FISHERIES.

Under St. 1899, c. 448, § 16, the licensee of oyster beds in Buzzards Bay may recover damages for loss suffered by reason of the pollution of the water over the flats by a sediment of sand and decayed organic matter stirred up by the excavations in the course of the construction of the Cape Cod Canal which caused the oysters to sicken and perish. *Taylor v. Boston, Cape Cod & New York Canal Co.* 307.

## FRATERNAL BENEFICIARY ASSOCIATION.

A national association, formed "to create and having control over" State and local organizations, "and to provide for and comfort the sick and distressed members of the order," is a fraternal beneficiary association and is not a charitable organization. *McCarty v. Cavanaugh*, 521.

In this suit in equity by the proper officer of a national fraternal beneficiary association against former officers of a subordinate lodge for the possession of certain property formerly of that lodge, the plaintiff contended that he was entitled to the property by reason of a law of the association and of the lodge which provided that, upon a lodge disbanding, such property should be turned over to him; but it appeared that the subordinate lodge had seceded from the national organization, so that the provision as to a lodge disbanding did not apply and the suit was dismissed. *Ibid.*

## FRAUD.

In a suit in equity, by the administrator *de bonis non* of an estate against a bank in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, where it appeared that the bank had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate, it was held that the defendant was not bound to account for the amount of checks on the account of the estate deposited to the administrator's personal account on the days following certain overdrafts where other checks drawn upon other sources more than sufficient in amount to take up the overdraft were deposited on the same day. *Allen v. Fourth National Bank*, 239.

In the same suit it was held that under the circumstances the defendant was not bound to account to the plaintiff for the amount of certain checks on the account of the estate which made possible certification of checks on the administrator's personal account. *Ibid.*

Nor for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection. *Ibid.*

In a suit in equity by an administrator *de bonis non* of the estate of a married woman who conveyed to her sister certain real estate which left her insolvent, to obtain the satisfaction of his individual claim out of such real estate it was held that, although the facts showed that the conveyance was made upon an agreement of the defendant to support the grantor and her husband, which was a valuable consideration so that the deed was good between the parties, the conveyance was fraudulent in law as against creditors and might have been avoided by them. *Rolfe v. Clarke*, 407.

On the facts in evidence it was held that a young man eighteen years and nine months of age could not maintain a libel under R. L. c. 151, § 11, to annul his marriage on proving that his wife was pregnant by another man two months before he met her for the first time and that she induced him

to believe that he was the only man who ever had had intercourse with her and that he was responsible for her condition. *Safford v. Safford*, 392.

Where a woman, who had promised to be a faithful wife, went through a marriage ceremony solely to secure the right to appear as a married woman and thus to conceal the fact that she had had an illegitimate child, secretly intending to leave her husband immediately after the ceremony to go to a foreign country and not to see him again, and carried that plan into effect, the husband, who was deceived and acted in good faith, is entitled under R. L. c. 151, § 11, to a decree annulling the marriage. *Anders v. Anders*, 438.

Under the circumstances, where after a suit in equity for the rescission of a sale for fraud had pended for ten months, the plaintiff elected to rely solely on his prayer for damages, the court properly retained jurisdiction for that purpose. *Rosen v. Mayer*, 494.

Mere silence or failure by a buyer of goods to inform their seller of facts relating to the buyer's financial responsibility, which for his own protection the seller ought to know, does not constitute fraud which will enable the seller to avoid the sale and maintain an action of replevin to compel a return of the goods. *Phinney v. Friedman*, 531.

Evidence which was held not to be sufficient for the maintenance of an action of replevin by a seller of goods against the assignee for the benefit of creditors of the buyer, a corporation, to compel the return of the goods on the ground that the buyer purchased them with the actual but undisclosed intention not to pay for them, where it appeared that the treasurer of the corporation, its financial backer, had withdrawn his support the day after the sale. *Ibid.*

But evidence as to a sale thirty days after the treasurer withdrew his support, when the buyer was insolvent, was held to warrant the maintenance of an action of replevin for the return of the goods then sold. *Ibid.*

### FRAUDULENT CONVEYANCE.

See appropriate subtitle under EQUITY JURISDICTION.

### GARAGE.

Under St. 1913, c. 577, as amended by St. 1914, c. 119, regulating the erection and maintenance of garages in the city of Boston, a notice must be mailed to each one of a number of tenants in common owning an abutting parcel of land. *Wright v. Lyons*, 167.

The giving of the notice required by the above statute is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant the permit. *Ibid.*

A suit in equity may be maintained to enjoin the erection and maintenance of a garage in the city of Boston on land adjoining that of the plaintiff without lawful authority under St. 1913, c. 577, as amended by St. 1914, c. 119, upon showing special damage suffered by the plaintiff by reason of noise, confusion, noisome odors and the storing of large quantities of inflammable and explosive material, although by the acts complained of a public nuisance also was created. *Ibid.*

### GENERAL COURT.

As to apportionment of the counties into representative districts. *Attorney General v. Apportionment Commissioners*, 598.

### GIFT.

In a suit in equity brought by a girl against the executor of the will of her aunt for the amount of a savings bank account in the aunt's name as trustee for the girl, it was held that a finding was justified, if not required, that the account in the savings bank became a completed gift when the plaintiff's aunt first informed her that the original deposit of money in that account was the money that had belonged to the plaintiff's mother, and that the gift was accepted by the plaintiff. *Moore v. O'Hare*, 283.

### GUARANTY.

In an action by a surety company against the executor of the will of one of two trustees, upon an agreement of the two trustees indemnifying the company from loss caused by its being on their individual bonds, to recover for loss sustained by the company by reason of misappropriations by the co-trustee of the defendant's estate, the defendant contended that negligence of the plaintiff barred recovery, but it was held that, the contract being one of guaranty given for the protection of the plaintiff, it owed no duty to the defendant's testator, who was one of the joint guarantors, to keep him advised as to the dealings with the trust property by his co-trustee and co-guarantor. *American Surety Co. of New York v. Vinton*, 337.

### GUARDIAN.

Expenses incurred by the guardian of an insane person in the defence of the ward's estate against proceedings for the collection of a charge for services, instituted by an attorney retained by the ward to render services in connection with the guardianship, are proper items in the guardian's account. *Ensign v. Faxon*, 145.

The proper place for the allowance of all expenses incurred and disbursements made in the proper execution of his trust by a guardian, executor, administrator, trustee or other fiduciary appointed by a probate court is in the account of his administration to the court appointing him. *Ibid.*

On the record on an appeal from a decree of a single justice of this court affirming a decree of a probate court allowing in the account of a guardian of an insane person certain items for expenses and disbursements incurred by the guardian in opposing in the probate court a successful petition of the ward to be discharged from guardianship, it was held that the decree must be affirmed because it could not be said as a matter of law that the items could not have been allowed properly. *Ibid.*

A guardian of an insane person is not "a person who is aggrieved," within the meaning of R. L. c. 162, § 9, by a decree of the Probate Court discharging him from his trust as guardian because the ward no longer is insane, and therefore has no right of appeal therefrom. *Ibid.*

It was intimated that heirs presumptive of the ward might have a right of appeal from such a decree. *Ensign v. Faxon*, 145.

A ward is not estopped to raise an objection to items of expense in his guardian's account on the ground that they were incurred in an appeal from a decree discharging the guardian which the court had no jurisdiction to entertain, merely because at no time during the proceedings where the expenses were incurred, which were long and expensive, did the ward object that the guardian's conduct in appealing was legally unwarranted or that the court lacked jurisdiction to entertain the appeal. *Ibid.*

### HIGHWAY.

See *WAY, Public.*

### HOUSE OF REPRESENTATIVES.

Principles which should govern the apportionment of the counties into representative districts by special commissioners under art. 21 of the Amendments to the Constitution. *Attorney General v. Apportionment Commissioners*, 598. *Mandamus* was maintained where the constitutional provisions were violated. *Ibid.*

### HUSBAND AND WIFE.

A married woman, who at the time of her husband's death was living apart from him merely on account of his inability to obtain and perform sufficiently remunerative work to provide a home for his wife and child, cannot be found to have been living apart from him for justifiable cause within the meaning of St. 1914, c. 708, § 3 (a) in the amendment of § 7 of St. 1911, c. 751, Part II. *Veber's Case*, 86.

**MARRIAGE AND DIVORCE**, see that title.

### INDUSTRIAL ACCIDENT BOARD.

See **WORKMEN'S COMPENSATION ACT.**

### INSANE PERSON.

What are proper charges of a guardian of an insane person against his ward in relation to proceedings by the ward for his discharge from guardianship. *Ensign v. Faxon*, 145.

### INSOLVENCY.

Suit by the receiver of an insolvent national bank for the collection of the amount of an assessment made by the comptroller of the currency upon the shareholders. *Weitzel v. Brown*, 190.

### INSURANCE.

*Life.*

In an action upon a policy of life insurance containing a provision which reads, "Conditions. Provided, however, that no obligation is assumed by said Com-



*Insurance (continued).*

pany prior to the date hereof, nor unless on said date the insured is alive, in sound health . . . ,” proof that on the date of the policy the insured was in sound health is a condition precedent to recovery, and the burden of proving compliance with that condition rests upon the plaintiff. *Fondi v. Boston Mutual Life Ins. Co.* 6.

Erroneous instruction to the jury on the above subject, which was held not to have been cured later by the judge in his charge. *Ibid.*

Proof of the performance of a condition precedent of a policy of life insurance is not affected by St. 1907, c. 576, § 21. *Ibid.*

Proper exclusion, as evidence on the issue, whether one insured was in sound health at the date of the policy, of a copy of a card kept by the State board of health but not as a public record. *Ibid.*

The mere facts, that an agent of a life insurance company took to a beneficiary under a policy a check payable to the beneficiary's order for the amount to which he was entitled, that the beneficiary indorsed it by signing his mark on the back and that the agent then took it away because the beneficiary wanted cash and not a check, do not prove that the check was delivered to the beneficiary and are not conclusive evidence of payment to the beneficiary of the amount due to him. *Shea v. Manhattan Life Ins. Co.* 112.

And where, at a trial of an action by the beneficiary against the insurance company for a balance due of the amount called for by the policy, besides the facts stated above, there is evidence that the beneficiary, when he called for the money due him at the office of the company, was paid a part of what was due him and was induced to leave the remainder with the company “on call” and bearing interest, and that the agent without authority from the beneficiary invested the balance in the capital stock of another corporation, a finding of the jury for the plaintiff for the full unpaid amount of the policy is warranted. *Ibid.*

And, because such an action is on the policy and is not to recover back the amount invested by the agent in the capital stock of another corporation, the plaintiff is not required, as a condition precedent to bringing his action, to tender back that stock, a certificate for which had been delivered to him in a sealed envelope without his knowledge. *Ibid.*

Nor should the presiding judge instruct the jury that the plaintiff is limited in his recovery to the amount unpaid of the sum called for by the policy less the value of the stock in the other corporation. *Ibid.*

Fraternal beneficiary insurance, see FRATERNAL BENEFICIARY ASSOCIATION.

*Accident.*

Evidence at the trial of an action on a policy of accident insurance upon which it was held that the jury were warranted in finding that a predisposition to rupture which the insured had was not a cause of the accident. *Collins v. Casualty Co. of America*, 327.

And it also was held that, the insured having come to his death through etherization which was an incident of an operation that was the proper treatment of his accidental injury and which could be found to have been a necessary or proper result of such injury, a finding was warranted that his death resulted from bodily injuries “effected directly and independently of all other causes through accidental means.” *Ibid.*

In an action on a policy of accident insurance containing a warranty that the insured was in sound condition physically, it appeared that the insured had had from his birth a predisposition to rupture, and after taking out the policy accidentally fell and ruptured himself, in consequence of which he died, but there was no evidence that the warranty of sound condition was made with intent to deceive and it was held that the provisions of St. 1907, c. 576, § 21, still left it a question of fact for the jury to determine whether such unsoundness increased the risk of loss. *Collins v. Casualty Co. of America*, 327.

In the same case there was evidence, introduced by the defendant and not objected to by the plaintiff, not only that a predisposition to rupture increased the risk of loss but also that accident insurance companies generally did not take such a risk but it was held that the jury were not bound to believe the testimony to this effect and might make a finding to the contrary. *Ibid.*

#### Fire.

Referees and arbitrators under a policy in the Massachusetts standard form must be disinterested and impartial. *Doherty v. Phoenix Ins. Co.* 310.

Evidence, at the trial of an action on a fire insurance policy where the defendant sought to impeach the finding of the referees as to the amount of the loss on the ground of corruption of the referees by the plaintiff, upon which it was held that the jury were warranted in finding that the referees had not been influenced improperly and had acted throughout the proceedings in good faith. *Ibid.*

In the same case, where it was contended by the defendant that the award was so grossly in excess of the actual amount of the loss as to show that the referees must have been biased or have acted corruptly, it was held that certain evidence offered by the defendant as to the value of the property insured was excluded properly by the judge in the exercise of a sound discretion on the ground that it was too remote, speculative, collateral and immaterial and that it tended to confuse the jury and to divert their attention from the material issues on which they were to pass. *Ibid.*

In the case above described it did not appear that a statement of all the evidence introduced by both parties before the referees was offered at the trial, and it was held that the portion of such evidence printed in the record manifestly was insufficient to enable the jury to determine whether the referees committed such gross mistakes of overvaluation as to show misconduct. *Ibid.*

#### Taxation.

Under St. 1909, c. 490, Part III, §§ 28, 33, the excise "on all premiums received for insurance" by a domestic (not life) insurance company is imposed on the gross amount of the premiums and not merely on their net amount after deducting such dividends, if any, as the board of directors of a mutual company may decide to repay to its policy-holders. *American Mutual Liability Ins. Co. v. Commonwealth*, 299.

#### INTENT.

Evidence of, see appropriate subtitle under EVIDENCE.

### INTEREST.

If a jury, in an action where the plaintiff is entitled to interest, return a verdict for the plaintiff in a certain sum "with interest," the presiding judge has power, before the verdict is recorded, to order the amount of the verdict to be amended by the addition of interest. *Fondi v. Boston Mutual Life Ins. Co.* 6.

Where, by the provisions of an assignment of a chose in action, it is clear that the whole amount of the claim was intended to be assigned, the assignee is entitled to receive accumulated interest as incidental to the right to receive the principal sum. *Bennett v. Tighe*, 159.

### INTERROGATORIES.

See that subtitle under PRACTICE, CIVIL.

### INTERSTATE COMMERCE.

Although the sending of stock quotations by the New York Stock Exchange to a telegraph company at its place of business in Boston is interstate commerce, yet the furnishing of such quotations by the telegraph company to its customers or patrons in its ticker service at their Boston offices is domestic business and is analogous to selling at retail in the local market a commodity purchased at wholesale outside the Commonwealth. *Western Union Telegraph Co. v. Foster*, 365.

Consequently the federal interstate commerce act does not apply to such ticker service and it is subject to the law of this Commonwealth. *Ibid.*

St. 1913, c. 257, providing that a foreign corporation "which is engaged in or soliciting business in this Commonwealth" may be served with process in the manner provided for service against domestic corporations is not made unconstitutional because it applies to corporations whose business transacted here is wholly interstate in its nature. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

### INVITED PERSON.

See that subtitle under NEGLIGENCE.

### JOINT TENANTS AND TENANTS IN COMMON.

Under St. 1913, c. 577, as amended by St. 1914, c. 119, regulating the erection and maintenance of garages in the city of Boston, a notice must be mailed to each one of the number of tenants in common owning an abutting parcel of land. *Wright v. Lyons*, 167.

The giving of the notice required by the above statute is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant the permit. *Ibid.*

### JOINT TORTFEASORS.

In an action for personal injuries sustained when a carriage in which the plaintiff was driving was run into by an automobile belonging to the defend-

ant's brother and operated negligently by the defendant's son, where there was evidence of control exercised by the defendant over his son and also evidence that the defendant's brother also gave directions to the defendant's son as its driver, it was held that this evidence, if believed, would not be a defence for the defendant, as it might be found that the defendant participated with his brother in the active management of the car. *Hutchings v. Vacca*, 269.

Where the owner and the tenant of a building were sued jointly for personal injuries caused by negligence in the construction and maintenance of the building, and at the trial of the action the jury, on evidence amply warranting such findings, returned a verdict for the defendant tenant and for the plaintiff against the defendant owner, an exception of the owner to a refusal of the presiding judge to rule that the plaintiff could not recover on the allegations of joint liability in the declaration must be overruled. *Howard v. Central Amusement Co.* 344.

Where, with the acquiescence of the plaintiff, an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

No opinion was expressed upon the question whether before the trial the plaintiff was entitled to have the action against each defendant for negligently causing the death of his intestate decided upon its own merits without regard to the fact that another action was pending against another defendant based upon the same facts. *Ibid.*

### JUDGMENT.

If a non-resident defendant, on whom no personal service has been made but whose property has been attached by trustee process, appears specially and answers and defends the case for the sole purpose of protecting his rights in the goods, effects and credits in the hands of the alleged trustee without submitting himself generally to the jurisdiction of the court, he has a right to be heard in protection of his property thus attached, and the judgment rendered, if against him, will be valid only to secure the application of the attached property to the satisfaction of the judgment. *Cheshire National Bank v. Jaynes*, 14.

In the case stated above a judgment in the defendant's favor would be no bar to a further prosecution of the plaintiff's claim against other property or against the defendant personally in case an effectual attachment or personal service afterwards should be made. *Ibid.*

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for the creditor indorses and signs upon the execution an acknowledgment of the receipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's

Judgment (*continued*).

acknowledgment of satisfaction, and the creditor in an action of contract on the judgment may recover the balance of the debt. *Smith v. Johnson*, 50.

In a suit in equity brought to restrain the enforcement of a judgment at law, which was entered after two trials on the merits and after the merits had been considered for a third time on a petition for a writ of review, which was denied, where the only matter alleged in the bill was disposed of completely by the findings of a master and was shown to be without foundation, it was ordered that the bill be dismissed with costs. *Nesson v. Gilson*, 212.

Collusion of a woman with her husband in permitting him to procure a divorce in another State in which neither of them had a domicile after which her former husband married another woman, and other conduct of hers, were held to preclude her upon the death of her former husband from setting up such collusion and the want of jurisdiction of the court that granted the divorce and claiming the rights of a widow in her former husband's estate. *Chapman v. Chapman*, 427.

Where, with the acquiescence of the plaintiff, an action against a railroad corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

## JURISDICTION.

The meaning of R. L. c. 170, § 1, and of §§ 6 and 9 of the same chapter, construed together, is that, where an effectual attachment of property of a non-resident defendant has been made, the best kind of notice which can be given under the circumstances shall issue. *Cheshire National Bank v. Jaynes*, 14.

If a non-resident defendant, on whom no personal service has been made but whose property has been attached by trustee process, appears specially and answers and defends the case for the sole purpose of protecting his rights in the goods, effects and credits in the hands of the alleged trustee without submitting himself generally to the jurisdiction of the court, he has a right to be heard in protection of his property thus attached, and the judgment rendered, if against him, will be valid only to secure the application of the attached property to the satisfaction of the judgment. *Ibid.*

In the case stated above a judgment in the defendant's favor would be no bar to a further prosecution of the plaintiff's claim against other property or against the defendant personally in case an effectual attachment or personal service afterwards should be made. *Ibid.*

Special appearance by a non-resident was not waived when, having excepted to a ruling that he could not defend only as to his property that was attached but must answer generally, he answered generally. *Ibid.*

St. 1905, c. 263, did not take away the power of the Supreme Judicial Court under R. L. c. 173, § 52, to allow an amendment changing a suit in equity in that court into an action at law. *Kerr v. Whitney*, 120.

The consent of the parties to a suit in equity cannot confer jurisdiction of the subject matter of the suit upon the court, where it otherwise does not exist. *Hill v. Moors*, 163.

The question, whether a court has jurisdiction to entertain a suit in equity, will be considered by the court on its own motion although it was not raised by any party to the suit. *Ibid.*

The giving of the notice required by St. 1913, c. 577, as amended by St. 1914, c. 119, is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant a permit to erect and maintain a garage in that city so far as the rights of those entitled to notice are affected. *Wright v. Lyons*, 167.

The courts of this Commonwealth have jurisdiction of an action of contract against a resident of this Commonwealth by a receiver of a national bank in Kentucky for the collection of the amount of an assessment made by the comptroller of the currency upon the plaintiff as a shareholder. *Weitzel v. Brown*, 190.

A court of equity has no supervisory jurisdiction over courts at law. *Nesson v. Gilson*, 212.

Facts relating to a resident passenger agent, which were held to warrant a finding that a railroad corporation organized under the laws of another State was engaged in business in as well as soliciting business in this Commonwealth, so that under St. 1913, c. 257, such corporation might be served with process in the manner provided for service in actions against domestic corporations. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

The validity of the provision of St. 1913, c. 257, making the effect of soliciting business by a foreign corporation in this Commonwealth the same as that of transacting business here, was not involved in the present case, where the foreign corporation rightly was found to be doing business in this Commonwealth. *Ibid.*

St. 1913, c. 257, is not made unconstitutional because it applies to corporations whose business transacted here is wholly interstate in its nature. *Ibid.*

Collusion of a woman with her husband in permitting him to procure a divorce in another State, in which neither of them had a domicile, after which her former husband married another woman, and other conduct of hers, were held to preclude her upon the death of her former husband from setting up such collusion and the want of jurisdiction of the court that granted the divorce and claiming the rights of a widow in her former husband's estate. *Chapman v. Chapman*, 427.

EQUITY JURISDICTION, see that title.

Jurisdiction of the Probate Court, see appropriate subtitle under PROBATE COURT.

## JURY AND JURORS.

The respondent in disbarment proceedings has no right to a trial by jury. *Matter of Carver*, 169.

## LABOR.

The right to work is property and one cannot be deprived of it by legislative enactment, it being protected by the Fourteenth Amendment to the Constitution of the United States and by the guaranties contained in the Massachusetts Declaration of Rights. *Bogni v. Perotti*, 152.

The provisions contained in St. 1914, c. 778, § 2, declaring that "in construing this act" the right to labor and to make and modify contracts to work "shall be held and construed to be a personal and not a property right," and prohibiting the granting of an injunction to enforce such a right "where no irreparable damage is about to be committed upon the property right of either" the employee or the employer, are unconstitutional and void. *Ibid.*

This court, having held St. 1914, c. 778, to be unconstitutional on other grounds, found it unnecessary to consider whether it also was unconstitutional by reason of the preference attempted to be conferred upon combinations of laborers. *Ibid.*

## LABOR UNION.

This court, having held St. 1914, c. 778, to be unconstitutional on other grounds, found it unnecessary to consider whether it also was unconstitutional by reason of the preference attempted to be conferred upon combinations of laborers. *Bogni v. Perotti*, 152.

## LACHES.

See that subtitle under EQUITY JURISDICTION.

## LAND COURT.

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a judge of the Land Court has no power to report questions of law for determination by this court until the case reported is ripe for the entry of a final decree in the Land Court. *Riverbank Improvement Co. v. Chapman*, 424.

## LANDLORD AND TENANT.

*What constitutes Relation.*

Under the provisions of a certain indenture between the Commonwealth, acting by the board of harbor and land commissioners, empowered thereunto by R. L. c. 96, § 3, and the Boston Fish Market Corporation, whereby the Commonwealth did "demise and lease unto" the corporation certain parts of Commonwealth Flats for a term of fifteen years, it was held that the corporation was not given a mere license under R. L. c. 96, § 17, but was a lessee of the premises. *Boston Fish Market Corp. v. Boston*, 31.

*Acceptance of Lease.*

Negotiations between a landlord and lessee at the expiration of a lease after the landlord sent to the lessee two originals of a new lease signed by him enclosed in a letter asking the former lessee to "sign one of the leases if correct," which were held not to be evidence for the jury of an acceptance of the lease by the defendant. *Henchey v. Rathbun*, 209.

It was also held that the act of the lessee in signing the proposed new lease, when not communicated to the landlord, could not be found to be an acceptance of the lease, and that the former lessee's secret purpose to obtain an option if he could and, if he failed to obtain it, to take what was offered could not be made the basis of an enforceable contract. *Ibid.*

In the same case it was held that the duplicate original of the new lease signed by the landlord only, being an uncompleted instrument, could not have the effect of a deed poll. *Ibid.*

*Construction of Lease.*

A provision in a lease by the Commonwealth to a corporation of a portion of the Commonwealth Flats, that the lessee "shall also pay . . . all annual taxes which may be assessed upon the premises leased. . . . By 'annual taxes,' as applied to the leased premises, is meant the annually recurring municipal tax, and not any betterment taxes for street construction or other special taxes or assessments," requires the lessee to pay all the tax as assessed under St. 1909, c. 490, Part I, § 12, the word "municipal" as here used including the county and State taxes. *Boston Fish Market Corp. v. Boston*, 31.

A lease whose term was stated to be "One year from the first day of September one thousand nine hundred and thirteen, . . . and thereafter from year to year until one of the parties hereto shall, on or before the first day of July in any year, give to the other party written notice of his or her intention to terminate this lease on the last day of the following August, in which case the term hereby created shall terminate in accordance with such notice" was held to be terminable only by a notice given in accordance with its provisions or by operation of law. *Noble v. Brooks*, 288.

Construction of the provisions of a lease, manifestly drawn by a person who did not appreciate the meaning of the legal terms that he tried to use, where, after the lessee was declared a bankrupt, the lessor, to whom the keys of the leased premises were delivered, "took possession of said premises under the terms of said lease," upon which it was held that the entry and taking possession by the lessor terminated the lease. *Louis K. Liggett Co. v. Wilson*, 456.

*Covenant to pay Taxes.*

Under a lease made for a term of twenty years from May 1, 1893, wherein the lessee covenanted to pay "all the taxes . . . , except betterments, whether in the nature of taxes now in being or not which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term," it was held that, by reason of St. 1909, c. 440, which changed the day of assessment from May 1 to April 1, the lessee must pay the tax



**Landlord and Tenant (continued).**

assessed on April 1, 1913, although the result was that he had to pay the taxes for twenty-one years under a twenty year lease. *Welch v. Phillip*, 267.

*Effect of Mortgage of Premises.*

A mortgage, in the usual form, of real estate which is subject to a lease operates as an assignment of the lease. *Noble v. Brooks*, 288.

Where the mortgagee of real estate which is subject to a lease enters and takes possession of the property for a breach of condition and gives notice to the lessee, he is entitled to all rent thereafter accruing and the lease remains in full force and effect until terminated in accordance with its terms or by operation of law. *Ibid*.

*Landlord's Liability for Defective Premises.*

On the evidence at the trial of an action against one owning and controlling an apartment house by a tenant of one of the apartments for personal injuries sustained by reason of a defect in a common stairway, it was held that the questions of the plaintiff's due care and of the defendant's negligence were for the jury. *Stagnaro v. Fitzgerald*, 265.

*Landlord's Liability for Nuisance.*

One, who places and maintains a stucco ornament negligently constructed and of improper materials on the front of a building belonging to him so that it projects over a public sidewalk and constitutes a continuing nuisance dangerous to persons using the way, does not escape liability for injuries caused by pieces of the stucco breaking off and falling on persons passing below by letting the building to another and taking no precaution to guard against the danger or to provide that the tenant should do so. *Howard v. Central Amusement Co.* 344.

*Rights of Receiver of Leased Property.*

Where a receiver is appointed to take possession of real estate that is subject to a lease, and a mortgagee of the property in possession surrenders the property to the receiver, this does not operate as an assignment of the lease to the receiver, and in suing on a covenant of the lease for accrued rent the receiver must sue in the name of the lessor. *Noble v. Brooks*, 288.

*Termination of Tenancy.*

Construction of the provisions of a lease, manifestly drawn by a person who did not appreciate the meaning of the legal terms that he tried to use, where, after the lessee was declared a bankrupt, the lessor, to whom the keys of the leased premises were delivered, "took possession of said premises under the terms of said lease," upon which it was held that the entry and taking possession by the lessor terminated the lease. *Louis K. Liggett Co. v. Wilson*, 456.

*Lessor's Rights upon Termination during Term.*

In a suit in equity by a lessor against the lessee and his assignee for the benefit of creditors to enforce the rights of the plaintiff under the lease which had been terminated by the lessor in accordance with its terms, it was held that, under the circumstances, whether the plaintiff elected under the provisions of the lease to claim damages or to claim indemnity was a question of fact with the burden of proof resting on the plaintiff, and that whether the plaintiff by letting a part of the premises to the former lessee waived his claim for damages also was a question of fact. *Gardiner v. Parsons*, 347.

## LAND REGISTRATION.

See LAND COURT; WRONGFUL REGISTRATION OF LAND.

## LARCENY.

Under R. L. c. 218, §§ 38, 67, an indictment charging that the defendant "did steal money" is a sufficient indictment for larceny by false pretences. *Commonwealth v. Carver*, 42.

Evidence at the trial of an indictment for larceny, where it appeared that the defendant procured money by false representations as to the genuineness of indorsements on a promissory note, was held to warrant a finding that the defendant procured the money by false pretences, which is larceny within the provisions of R. L. c. 208, § 26; St. 1910, c. 378, § 2. *Ibid.*

At the trial of the above described indictment for larceny after a witness in cross-examination has testified in effect that he did not make up his mind to make any loan until the defendant signed the note, the witness properly was permitted to be asked in redirect examination, "whether or not you would have parted with your money . . . if" the defendant "had not made the representations to you." *Ibid.*

Where, at such trial, the defendant admits that all the handwriting on the note is his own, but contends that he was authorized by the persons whose names were thereon to use their names, evidence is admissible to show that the defendant attempted to imitate the handwriting of such persons, such evidence being competent to show a guilty purpose to deceive and defraud, and therefore being relevant. *Ibid.*

In the same case it was held, that one of the persons whose name was on the note was a competent witness to testify as to whether the signature purporting to be his looked like his handwriting. *Ibid.*

## LEGACY.

See DEVISE AND LEGACY.

## LEGISLATURE.

See GENERAL COURT.

### LICENSE.

Under St. 1913, c. 577, as amended by St. 1914, c. 119, regulating the erection and maintenance of garages in the city of Boston, a notice must be mailed to each one of the number of tenants in common owning an abutting parcel of land. *Wright v. Lyons*, 167.

The giving of the notice required by the above statute is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant the permit. *Ibid.*

The question, whether under St. 1816, c. 103, and St. 1912, c. 559, Part I, § 63, "the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market," was answered in the affirmative. *Commonwealth v. Clay*, 271.

In this Commonwealth a right granted to a private person to use a public street for a private purpose is a mere license revocable at pleasure. *Union Institution for Savings v. Boston*, 286.

A permit granted by the board of street commissioners of the city of Boston under St. 1913, c. 680, to erect and maintain a post with a clock thereon set in the sidewalk of a public street of that city, without limitation as to time and without express reservation of a power to revoke the permit, is a revocable license, and the right granted does not become a contract by the erection of a post and clock in accordance with its terms. *Ibid.*

### LIEN.

#### *Equitable.*

An assignment by the maker of a promissory note to the payee, as security for the payment of the note, of "money to be received" by the maker upon the performance, not yet completed, of a contract between him and a third person for the manufacture of certain articles, creates, as between the parties to the assignment, an equitable lien or charge upon the contract price when earned to the amount of the note and interest. *Jennings v. Whitney*, 138.

Circumstances under which an equitable lien created by an assignment of "money to be received" under an uncompleted contract with the United States for the manufacture and delivery of certain navy supplies was enforceable in a suit in equity. *Ibid.*

### LIME.

The fact that a person was injured by the explosion of a can of lime when it was being opened is not in itself evidence that the canner who packed the lime in the can and put it on the market did so negligently. *Kurick v. Thorndike & Hix, Inc.* 413.

### LIMITATIONS, STATUTE OF.

A suit in equity by one, who, under an agreement in writing with the owner of certain land providing for its purchase and for payment therefor in instal-

ments, had entered upon the land and had made extensive improvements, against the owner and one who, with full knowledge of the agreement and of expenditures made by the plaintiff toward the purchase price and for improvements, had purchased the land from the owner and had dispossessed the plaintiff, was held to be barred by the statute of limitations. *Young v. Walker*, 491.

### MANDAMUS.

Mandamus is not the proper remedy for compelling a corporation to comply with the provisions of St. 1903, c. 437, § 44. *Teale v. Rockport Granite Co.* 20.

If, purporting to act under a by-law adopted by a town under St. 1913, c. 655, § 1, the selectmen refuse for no stated reason to grant permission for the erection of a factory which in every way conforms in design, material, safety and sanitary provisions to standards set by the town in an elaborate and comprehensive code of building by-laws, a writ of mandamus should issue to compel the granting of a permit. *Kilgour v. Gratto*, 78.

A petition for a writ of mandamus addressed to the Suffolk County apportionment commissioners, who had filed a report purporting to make an apportionment of representation in the legislative districts in that county which was void as in violation of art. 21 of the Amendments to the Constitution, commanding them to proceed with the performance of their duties under St. 1913, c. 835, in accordance with the provisions of the Constitution, affords the appropriate form of relief and is a remedy expressly provided by § 502 of the statute named for enforcing the provisions of that chapter. *Attorney General v. Apportionment Commissioners*, 598.

The remedy by mandamus described above is available to a citizen and voter interested in the execution of the laws. *Ibid.*

In the case above described it was held that in issuing the writ of mandamus no specific time need be fixed for the completion by the commissioners of their work, it being assumed that they would be actuated by a consciousness of serious public duty with the obligations thereby entailed. *Ibid.*

In the case above described it was held, that, the public interests being involved, the Attorney General might institute and maintain a petition for a writ of mandamus to vindicate the public right. *Ibid.*

On a petition by the Attorney General for a writ of mandamus addressed to the Suffolk County apportionment commissioners elected under St. 1913, c. 835, § 390, declaring an apportionment of representation in the legislative districts in that county attempted to be made by the respondents to be void as not in conformity with the Constitution, a clause in the reservation for determination of the case by this court, stating that, if the question whether the respondents acted in good faith was material, this court might draw conclusions from the apportionment itself, was disregarded by this court because this court has no power to decide facts in a proceeding at law. *Ibid.*

### MARKET.

See PUBLIC MARKET.

## MARRIAGE AND DIVORCE.

Collusion of a woman with her husband in permitting him to procure a divorce in another State in which neither of them had a domicile, after which her former husband married another woman, and other conduct of hers, were held to preclude her upon the death of her former husband from setting up such collusion and the want of jurisdiction of the court that granted the divorce and claiming the rights of a widow in her former husband's estate. *Chapman v. Chapman*, 427.

On the facts in evidence it was held that a young man eighteen years and nine months of age could not maintain a libel under R. L. c. 151, § 11, to annul his marriage on proving that his wife was pregnant by another man two months before he met her for the first time and that she induced him to believe that he was the only man who ever had had intercourse with her and that he was responsible for her condition. *Safford v. Safford*, 392.

Where a woman, who had promised to be a faithful wife, went through a marriage ceremony solely to secure the right to appear as a married woman and thus to conceal the fact that she had had an illegitimate child, secretly intending to leave her husband immediately after the ceremony to go to a foreign country and not to see him again, and carried that plan into effect, the husband, who was deceived and acted in good faith, is entitled under R. L. c. 151, § 11, to a decree annulling the marriage. *Anders v. Anders*, 438.

## MARRIED WOMAN.

See HUSBAND AND WIFE.

## MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

## MASTER IN CHANCERY.

Under R. L. c. 162, § 15, which provides that probate appeals "shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases," a reference of a probate appeal to an auditor "to hear the parties and their evidence, to find the facts, and report the same to the court" will be treated as a reference to a master and the auditor's report will be treated as a master's report. *Chapman v. Chapman*, 427.

See also EQUITY PLEADING AND PRACTICE, *Master*.

## MEDFORD.

The vote provided for by § 7 of St. 1903, c. 345, the charter of the city of Medford, at "general meetings of the inhabitants of the city" called upon the request in writing of fifty qualified voters by the board of aldermen was held to be merely advisory so that it cannot take away or suspend any

powers of the board of aldermen of that city. *Fuller v. Mayor of Medford*, 176.

Accordingly a petition, signed by twenty-five per cent of the qualified voters of that city and presented to the board of aldermen, requesting that there be placed on the official ballot at the next municipal election to be held in about eleven months from that time the questions, whether a city hall should be built and, if to be built, whether it should be built under the supervision of three or more citizens, does not take away or suspend the power of the board of aldermen of that city to pass an order for the construction of a city hall. *Ibid.*

And a subsequent vote by the voters of the city at the next municipal election not to borrow or appropriate money for a city hall has no binding effect on the city. *Ibid.*

In such a case, a bill in equity under R. L. c. 25, § 100, by ten taxable inhabitants of the city of Medford to restrain the mayor and the city treasurer of that city from borrowing money to construct a city hall will be dismissed. *Ibid.*

Where an order to construct a city hall in Medford accompanied by a letter from the mayor was presented to the board of aldermen of that city at a regular meeting and was referred to a committee, and two weeks later upon a favorable report from the committee, the order was adopted on a roll call with three votes in the negative, it was held that the order was not passed through all its stages at one session, that its passage was upon its second stage, and that therefore it was not necessary to consider whether a negative vote was equivalent to an objection, and whether § 16 of St. 1903, c. 345, the charter of Medford, which permitted the passage of such an order at one session upon unanimous consent only, was violated. *Ibid.*

### MISTAKE.

A contention, in an action by a son against the executors of his father's will upon a contract in writing promising certain specific property to the son if he would manage the father's farm in the father's old age, that, under the circumstances, the plaintiff by accepting the benefits given by the will had exercised an election to ratify its provisions, which was introduced by the defendants for the first time at the argument before this court, was held not open upon the exceptions before this court, but it was said that, before the entry of final judgment, the defendants had the right to move in the Superior Court for a new trial on the ground "that, by mistake of parties or counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried." *Noyes v. Noyes*, 125.

### MORTGAGE.

#### *Of Personal Property.*

Provisions of a "trust receipt," given to a bank by an importer of hides, were held not to operate as a mortgage of the hides as against creditors of the importer, because it was not recorded. *Peoples National Bank v. Mulholland*, 448.

*Of Real Estate.*

A note and a mortgage securing the note, procured to be signed by duress exerted upon the maker and mortgagor, are voidable merely and not void, and therefore can be ratified and confirmed by the maker and mortgagor. *Webb v. Lothrop*, 103.

Conduct of a woman, who under duress executed and delivered a note and a mortgage securing it in consideration of a return to her of documents which might have been the basis of criminal proceedings against her husband and also of the transfer to her of several mortgages, upon which, it was held, she must be taken to have ratified and confirmed the note and mortgage so that she was unable to maintain a suit in equity to have them declared void and to enjoin the foreclosure of the mortgage. *Ibid.*

On an appeal, in a suit to enjoin the foreclosure of a mortgage, from a decree dismissing the bill, on all the evidence it was held that the plaintiff had failed to sustain a contention that the note and mortgage were void because their consideration was the compounding by the defendant of a felony of the plaintiff's husband or the stifling of a criminal prosecution against him. *Ibid.*

A mortgage, in the usual form, of real estate which is subject to a lease operates as an assignment of the lease. *Noble v. Brooks*, 288.

Where the mortgagee of real estate which is subject to a lease enters and takes possession of the property for a breach of condition and gives notice to the lessee, he is entitled to all the rent thereafter accruing and the lease remains in full force and effect until terminated in accordance with its terms or by operation of law. *Ibid.*

Where a receiver is appointed to take possession of real estate that is subject to a lease, and a mortgagee of the property in possession surrenders the property to the receiver, this does not operate as an assignment of the lease to the receiver, and in suing on a covenant of the lease for accrued rent the receiver must sue in the name of the lessor. *Ibid.*

## MOTOR VEHICLE.

Attempt by the buyer of an automobile to rescind the sale by a letter, sent while the car was in a garage, for breach of an oral warranty that the car was in perfect running order, was held to be ineffectual because he did not offer to return or tender the car to the seller and demand the return of the consideration until one month and four days after the date of his letter, which was held not to be within a reasonable time after he had knowledge that the warranty was broken. *Skilling v. Collins*, 275.

A suit in equity may be maintained to enjoin the erection and maintenance of a garage in the city of Boston on land adjoining that of the plaintiff without lawful authority under St. 1913, c. 577, as amended by St. 1914, c. 119, upon showing special damage suffered by the plaintiff by reason of noise, confusion, noisome odors and the storing of large quantities of inflammable and explosive material, although by the acts complained of a public nuisance also was created. *Wright v. Lyons*, 167.

Evidence at the trial of an action for personal injuries received by the plaintiff, when he was a traveller on the highway, by reason of his being run into by

an automobile driven by the defendant's son-in-law, upon which it was held that the jury were warranted in finding that the automobile was owned by the defendant and that the son-in-law was his employee. *Haywood v. Ogasapian*, 203.

And upon other evidence at the same trial it was held that the jury were warranted in finding that the driver at the time of the accident was engaged in his employer's business of selling fruit, confectionery and ice cream. *Ibid*.

A woman who, while travelling in an automobile owned by a corporation dealing in automobiles, received personal injuries, was held not to be able to recover in an action against the owner wherein she alleged and proved that her injuries were caused by negligence of the driver without wanton or reckless misconduct on his part, because, on the aspect of the evidence most favorable to the plaintiff, it appeared that she was not invited to go in the automobile by any one having authority from the defendant. *Kennedy v. R. & L. Co.* 207.

For cases involving questions of liability for negligent operation of motor vehicles, see appropriate subtitle under NEGLIGENCE.

## MUNICIPAL CORPORATIONS.

### *General Meetings.*

The vote provided for by § 7 of St. 1903, c. 345, the charter of the city of Medford, at "general meetings of the inhabitants of the city" called upon the request in writing of fifty qualified voters by the board of aldermen was held to be merely advisory so that it cannot take away or suspend any powers of the board of aldermen of that city. *Fuller v. Mayor of Medford*, 176.

### *By-laws and Ordinances.*

In St. 1913, c. 655, § 1, relating to the regulation of the inspection, materials, construction, alteration, repair, height, area, location and use of buildings and other structures "by ordinances or by-laws" of a city or town, the word "by-laws" means general rules which shall afford some standard of conduct to the landowner and some principle to direct the licensing board as to the exercise of their judgment and discretion in granting or denying a permit. *Kilgour v. Gratto*, 78.

A town is not given power or authority by that statute to adopt and enforce a by-law vesting in its selectmen the power in their absolute and uncontrolled discretion to refuse permission to erect a factory, however perfect in design, non-combustible in material, and safe and sanitary in equipment. *Ibid*.

If, purporting to act under authority given by such a by-law, the selectmen refuse for no stated reason to grant permission for the erection of a factory which in every way conforms in design, material, safety and sanitary provisions to standards set by the town in an elaborate and comprehensive code of building by-laws, a writ of mandamus should issue to compel the granting of a permit. *Ibid*.

The question, whether under St. 1816, c. 103, and St. 1912, c. 559, Part I, § 63, "the city of Salem could require a permit and the payment of a fee



therefor before one could occupy a stand in the market," was answered in the affirmative. *Commonwealth v. Clay*, 271.

### *Officers and Agents.*

Enumeration by RUGG, C. J., of classes of cases illustrating the regulation, that properly may be delegated to the discretionary supervision of a local board, of occupations and uses of property which may create nuisances. *Kilgour v. Gratto*, 78.

If, purporting to act under a by-law adopted by a town under St. 1913, c. 655, § 1, the selectmen refuse for no stated reason to grant permission for the erection of a factory which in every way conforms in design, material, safety and sanitary provisions to standards set by the town in an elaborate and comprehensive code of building by-laws, a writ of mandamus should issue to compel the granting of a permit. *Ibid*.

Construction of certain provisions of the charter of the city of Medford as affecting the power of and method of procedure by the board of aldermen. *Fuller v. Mayor of Medford*, 176.

In granting locations for street railways, the appropriate boards of towns and cities are public officers and not agents of their respective municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

Street commissioners of Boston, see BOSTON.

### *Board of Aldermen.*

The vote provided for by § 7 of St. 1903, c. 345, the charter of the city of Medford, at "general meetings of the inhabitants of the city" called upon the request in writing of fifty qualified voters by the board of aldermen was held to be merely advisory so that it cannot take away or suspend any powers of the board of aldermen of that city. *Fuller v. Mayor of Medford*, 176.

Accordingly a petition, signed by twenty-five per cent of the qualified voters of the city and presented to the board of aldermen, requesting that there be placed on the official ballot at the next municipal election to be held in about eleven months from that time the questions, whether a city hall should be built and, if to be built, whether it should be built under the supervision of three or more citizens, does not take away nor suspend the power of the board of aldermen of that city to pass an order for the construction of a city hall. *Ibid*.

And a subsequent vote by the voters of the city at the next municipal election not to borrow or appropriate money for a city hall has no binding effect on the city. *Ibid*.

Where an order to construct a city hall in Medford accompanied by a letter from the mayor was presented to the board of aldermen of that city at a regular meeting and was referred to a committee, and two weeks later upon a favorable report from the committee the order was adopted on a roll call with three votes in the negative, it was held that the order was not passed through all its stages at one session, that its passage was upon its second stage, and that therefore it was not necessary to consider whether a negative vote was equivalent to an objection, and whether § 16 of St.

1903, c. 345, the charter of Medford, which permitted the passage of such an order at one session upon unanimous consent only, was violated. *Fuller v. Mayor of Medford*, 176.

### *Dedication.*

An attempt or offer made by a burial ground corporation to dedicate a lot marked out upon its land by stakes or bounds for the erection of a soldiers' monument, which was followed five months later by a deed from the corporation to the town of all its land that was accepted by the town without knowledge of the attempt or offer of the corporation to dedicate the lot for the purpose named, such purpose not being known by the town or by the public until nearly forty years after the conveyance to the town, does not constitute a completed dedication, there having been no acceptance by the public. *Mighill v. Rowley*, 586.

### *Street Railway Locations.*

In granting locations for street railways, the appropriate boards of towns and cities are public officers and not agents of their respective municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

The Legislature has the power to change or to abrogate, to the loss of the municipalities, the terms and conditions contained in locations granted to street railway companies by the appropriate boards of towns and cities, although such grants of locations are phrased in the form of contracts and secure valuable financial obligations to the municipalities. *Ibid.*

And the public service commission, acting as public officers under St. 1913, c. 784, §§ 17, 19-22, 29, have power to do so by raising a rate of fare stated in the location. *Ibid.*

It was not necessary in the present case to determine whether, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon. *Ibid.*

By the enactment of the above named statute the Legislature waived whatever conditions or contracts were made by the appropriate municipal boards, who were public officers, and the street railway corporations in the granting and accepting of the locations, and therefore street railway corporations are not estopped from seeking from the public service commission permission to establish fares which are in excess of those agreed upon in such conditions or contracts. *Ibid.*

## MUNICIPAL COURTS.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

## NATIONAL BANK.

An assessment made by the comptroller of the currency of the United States upon the shareholders of an insolvent national bank binds them even if it is levied without notice to them. *Weitzel v. Brown*, 190.

*National Bank (continued).*

The courts of this Commonwealth have jurisdiction of an action of contract against a resident of this Commonwealth by a receiver of a national bank in Kentucky for the collection of the amount of an assessment made by the comptroller of the currency upon the plaintiff as a shareholder. *Weitzel v. Brown*, 190.

In an action by a receiver of a national bank against a shareholder for the amount of an assessment made by the comptroller of the currency, the defendant cannot inquire into the legality of the plaintiff's appointment nor question the validity of the bank's incorporation. *Ibid.*

Evidence at the trial of the above action, upon which it was held that a finding was warranted that the defendant's name appeared upon the books of the bank as a shareholder with his consent. *Ibid.*

A receiver of a national bank, who has been ordered by the comptroller of the currency "to take all necessary proceedings, by suit or otherwise," to enforce the individual liability of shareholders of the bank under an assessment made upon them by the comptroller, can maintain in his own name as receiver an action against a shareholder for the collection of the assessment. *Ibid.*

Under U. S. Rev. Sts. §§ 178, 327, 884, copies of papers on file in the office of the national comptroller of the currency, certified by his deputy and authenticated by his seal of office, are competent evidence, in such an action, to prove the charter of the bank, its extension, the adjudication of insolvency by the comptroller, the appointment of the plaintiff as receiver, the assessment and the authorizing and directing of the receiver to bring suit for its collection. *Ibid.*

## NEGLIGENCE.

*Plaintiff's Due Care: Contributory Negligence.*

Of a woman who returned into a house where gas was smelling stronger and stronger. *Soulier v. Fall River Gas Works Co.* 53.

Of a captain in the fire department of a city who was in charge of an automobile ladder truck which was run into by a street railway car. *Lynch v. Boston Elevated Railway*, 93.

Of a woman who fell on a common stairway in an apartment house. *Stagnaro v. Fitzgerald*, 265.

Of a woman stumbling on the base of a weighing machine in a store. *Nye v. Louis K. Liggett Co.* 401.

Of a woman who fell over a portable step on the platform of a railroad station. *Regan v. Boston & Maine Railroad*, 418.

In an action by a woman against the proprietor of a retail drug store for personal injuries caused by the plaintiff stumbling over the base of a weighing machine when she had turned from a soda counter to pass out of the store, under St. 1914, c. 553, it is a question for the jury, with the burden of proof on the defendant, whether the presumption of the plaintiff's due care has been overcome by all the evidence. *Nye v. Louis K. Liggett Co.* 401.

One travelling on foot in the evening on a public way may be found to have been in the exercise of due care when walking in the roadway because the sidewalk was muddy. *Booth v. Meagher*, 472.

*Due Care of Plaintiff's Decedent.*

Of a boy on a bicycle, who was run over by a street car and killed. *McKechnie v. Boston Elevated Railway*, 36.

Of a pedestrian run into by a street car and killed. *Hayes v. Boston Elevated Railway*, 303.

*Invited Person.*

One who enters upon premises of another on business of his own and with a reasonable expectation of gratuitous favors to be given to him there by the owner of the premises does not have the rights of an invited person as distinguished from those of a licensee. *Laporta v. New York Central Railroad*, 100.

A woman who, while travelling in an automobile owned by a corporation dealing in automobiles, received personal injuries, was held not to be able to recover in an action against the owner wherein she alleged and proved that her injuries were caused by negligence of the driver without wanton or reckless misconduct on his part, because, on the aspect of the evidence most favorable to the plaintiff, it appeared that she was not invited to go in the automobile by any one having authority from the defendant. *Kennedy v. R. & L. Co.* 207.

*Licensee.*

One who enters upon the premises of another on business of his own and with a reasonable expectation of gratuitous favors to be given to him there by the owner of the premises does not have the rights of an invited person as distinguished from those of a licensee. *Laporta v. New York Central Railroad*, 100.

Where an employee of a contractor with the acquiescence of a railroad corporation enters upon its property for the purpose of crossing a track to borrow a tool for his employer from the corporation and is struck and injured by a locomotive engine, he cannot recover in an action of tort against the corporation for his injuries so received without proving that his injuries were caused by wanton and reckless misconduct of the defendant or its employees. *Ibid.*

*Imputed Negligence.*

In an action against a street railway company by a captain in the fire department of a city who, when in charge of an automobile ladder truck and sitting beside the driver while an agent of the manufacturer of the truck was instructing members of the department how to handle it, was injured in a collision with a street car, negligently driven, it was held that a finding that the plaintiff was in the exercise of due care was not warranted, whether he be judged by his own conduct or by that of the driver of the truck. *Lynch v. Boston Elevated Railway*, 93.

*Employer's Liability.*

Federal employers' liability act.

In an action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's

*Negligence (continued).*

- employ, evidence as to a conversation of the deceased with the defendant's yardmaster at the freight yard where the accident occurred was held not to be evidence that the yardmaster told the deceased to return on that track. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.
- In the same case it was held that the yardmaster, having had no reason to suppose that the deceased would try to return on the occupied track, was under no duty to warn him not to do so. *Ibid.*
- In the same case it was held that under the circumstances disclosed by the evidence it was the duty of the deceased, after having delivered the cars that he had brought to the freight yard, to go to the yardmaster to ascertain what track he was to use in going out. *Ibid.*
- In the same case it was held that certain rules of the defendant introduced by the plaintiff must be construed together. *Ibid.*
- In the same case it was held that under such rules it was the duty of the engineer, unless he knew that the course adopted by the conductor would bring about a condition of danger, to follow the conductor's orders. *Ibid.*
- In the same case it was held, that, assuming that it would have been the duty of the head brakeman to have done what he could to prevent the accident if he had had any reason to foresee it, yet he had no reason to suppose that the deceased conductor would undertake to return with the engine on the occupied track. *Ibid.*
- In the same case it was held that it was no part of the duty of the fireman to examine the tracks in order to warn the conductor, who was in charge of the train subject to the orders of the yardmaster, as to which track he ought to take on coming back. *Ibid.*
- In the case described above it was said that the deceased, although an experienced and careful conductor, neglected his duty four times before the accident that caused his death, and that on the evidence he was the only person who could have been found to be negligent and that the case came within the decision in *Great Northern Railway v. Wiles*, 240 U. S. 444. *Ibid.*

**Defective and dangerous machinery and appliances.**

Circumstances, under which a corporation which was constructing a dam used during a period of at least four months for the purpose of conducting steam to steam drills several stationary steam boilers set up in shacks and a system of steam pipes running from them to the drills, were held to show that the boilers and the pipes connected with them were permanent appliances so that the corporation owed to its employees the common law duty of maintaining such appliances in a reasonably safe condition and of warning those using them of perils attending their use. *Joyce v. Power Construction Co.* 496.

And where, at the trial of the above described action there is evidence tending to show that the break was caused either by the sagging of the two inch pipe due to its being inadequately supported by reason of negligence of fellow servants of the plaintiff, or by the chemical action upon the connecting threads at the joint of the two pipes of ashes in which the pipes were buried, or to both causes acting concurrently, it cannot be ruled as a matter of law that the plaintiff's injuries were caused solely by the negligence of his fellow employees and therefore that he cannot recover and they might have been found to have been caused in part by a neglect of duty on the part of

the defendant in failing properly to protect the pipe under the shack from the chemical action of the ashes. *Joyce v. Power Construction Co.* 496.

The record in the above action stated that, at the trial, subject to an exception by the defendant, the judge in his charge stated: "I draw a distinction between this kind of work, that is, a construction of this character and a temporary staging put about a building, however I may be wrong in relation to that." Before this court the defendant presented no argument intended to show that it was harmed by such portion of the charge, and it was assumed that the exception was waived. *Ibid.*

Evidence, at the trial of an action by an employee against his employer for personal injuries received when the plaintiff was cranking an automobile truck of the defendant and caused by the engine "kicking back," was held not to warrant a finding that the "kicking back" was in any way due to negligence for which the defendant was responsible. *Card v. Turner Centre Dairying Association*, 525.

#### Fellow servant.

Where the evidence, in an action by an employee against his employer for personal injuries, made possible findings that the proximate cause of the action was either of two causes, one of which must have been due to negligence of fellow workmen of the defendant and the other to negligence of the defendant, it was held that it could not be ruled as a matter of law that the plaintiff's injuries were caused by negligence of his fellow workmen. *Joyce v. Power Construction Co.* 496.

#### *Street Railway.*

##### Traveller on highway.

In an action against a street railway company for personal injuries alleged to have been received in a collision of the plaintiff's automobile with a street car of the defendant, it was held that on conflicting evidence answers of the jury to special questions were neither inconsistent nor unwarranted, and that, as both parties had been found therein to have used ordinary care, the plaintiff's misfortune was not attributable to the fault of the defendant. *Boyd v. Boston Elevated Railway*, 199.

Conduct of a pedestrian who was struck by a street car and killed previous to the enactment of St. 1914, c. 553, was held, in an action for causing his death, not to warrant a finding that at the time of the injury that caused his death he was actively in the exercise of due care as required by the statute. *Hayes v. Boston Elevated Railway*, 303.

It was said that it was not necessary to pass upon the propriety of certain comments by a judge in his charge at the trial of an action against a street railway corporation for negligently causing the death of a traveller on the highway, as to the method of arriving at the penalty to be imposed on a defendant who was found guilty upon an indictment for manslaughter. *Ibid.*

##### Passenger.

In an action against a corporation operating a street railway for causing the death of a passenger on a car of the defendant who was thrown from the car when it was entering upon a curve, evidence offered by the defendant

Negligence (*continued*).

to show that the curve was constructed according to the recommendations contained in a certain handbook so that there would be a minimum of jerk and jolt was held properly to have been excluded as too remote. *Halloran v. Boston Elevated Railway*, 280.

In the same case the defendant offered to show "the number of cars that would be passing by at this time and the time between the cars." No offer was made to show the number of cars that in fact passed over that street on that day at that time and it was held that exclusion of the evidence was proper. *Ibid*.

In such action, where a previous fracture of the deceased's skull was admitted, evidence that a fractured skull impairs equilibrium and that habits of alcoholic drinking, which he was shown to have had, still further impair equilibrium was held rightly to have been excluded in the absence of evidence to show that the balance of mind or body of the intestate was less than normal at the time of the accident or that he was under the influence of liquor at that time. *Ibid*.

Determination, at the trial of an action against a corporation operating a street railway for causing the death of a passenger, of the meaning of the words "sharp curves" in a rule of the defendant requiring motormen in going round "sharp curves" not to run over four miles an hour, was held not to be a proper subject for inquiry of an expert witness, but to be understood by the jury according to their common and accepted usage and not in a mathematical or scientific sense. *Ibid*.

Where an electric street railway car suddenly moves backward for a considerable distance just as passengers have entered it and then without a substantial interval of time moves forward, and where both motions are of such violence as to throw a passenger each time against some part of the car, this is so contrary to common experience in the ordinary operation of street railway cars as to warrant an inference of negligence in the operation of the car. *Sullivan v. Boston Elevated Railway*, 405.

*Railroad.*

Evidence as to conduct of the plaintiff in an action by a woman against a railroad corporation for personal injuries sustained, when St. 1914, c. 553, was in force, in a station of the defendant by falling over a portable step when the plaintiff was walking toward the train for which she had purchased a ticket, which was held not to show as matter of law that the plaintiff was negligent. *Regan v. Boston & Maine Railroad*, 418.

On the evidence in such action it was held that it was a question for the jury whether the defendant was negligent in allowing the step to get out of place. *Ibid*.

If, in such an action, it appears that the care of the use of such steps on the station platform was left by the defendant to the servants of the Pullman Company, the defendant is responsible for their negligence which results in harm to its passengers. *Ibid*.

Action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's employ, during switching in a freight yard, where it was held that on the evidence the conductor was the only person who could have been found to have

been negligent, and that consequently there could be no recovery. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

*Motor Vehicle.*

In an action against a street railway company for personal injuries alleged to have been received in a collision of the plaintiff's automobile with a street car of the defendant, it was held that on conflicting evidence answers of the jury to special questions were neither inconsistent nor unwarranted, and that, as both parties had been found therein to have used ordinary care, the plaintiff's misfortune was not attributable to the fault of the defendant. *Boyd v. Boston Elevated Railway*, 199.

A woman who, while travelling in an automobile owned by a corporation dealing in automobiles, received personal injuries, was held not to be able to recover in an action against the owner wherein she alleged and proved that her injuries were caused by negligence of the driver without wanton or reckless misconduct on his part, because, on the aspect of the evidence most favorable to the plaintiff, it appeared that she was not invited to go in the automobile by any one having authority from the defendant. *Kennedy v. R. & L. Co.* 207.

In an action for personal injuries sustained when the carriage in which the plaintiff was driving was run into by an automobile belonging to the defendant's brother and operated negligently by the defendant's son, it was held that certain directions given by the defendant might have been found to have been intended to control or influence the conduct of the defendant's son in operating the car and that the question of the defendant's negligence was for the jury. *Hutchings v. Vacca*, 269.

In the same case there also was evidence that the defendant's brother also gave directions to the defendant's son as its driver, and it was held that this evidence, if believed, would not be a defence for the defendant, as it might be found that the defendant participated with his brother in the active management of the car. *Ibid.*

In an action against the proprietor of a motor truck for personal injuries sustained from the wagon in which the plaintiffs were driving on a highway having been run into from behind by the motor truck driven by a servant of the defendant, it was held on the evidence that it could not have been ruled as matter of law that the defendant's driver was in the exercise of due care. *Massie v. Barker*, 420.

It also was held that the questions, whether surprise occasioned by the sally of a dog was such as reasonably to cause the driver to be governed for the instant by impulse rather than by sound judgment, or whether the exercise of due care required him to observe with greater accuracy the direction of his car, were for the jury. *Ibid.*

At the trial of a suit by a woman sixty-one years of age against one who, while operating an automobile, ran into the plaintiff, who was walking on the side of the street because the sidewalk was muddy, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury. *Booth v. Meagher*, 472.

Evidence at the trial of an action by an employee against his employer for



Negligence (*continued*).

personal injuries received when the plaintiff was cranking an automobile truck of the defendant and caused by the engine "kicking back," was held not to warrant a finding that the "kicking back" was in any way due to negligence for which the defendant was responsible. *Card v. Turner Centre Dairying Association*, 525.

*In Use of Highway.*

In an action under St. 1906, c. 463, Part I, § 63, by an administrator against a corporation operating a street railway for causing the death of the plaintiff's intestate by reason of a collision of a car of the defendant with a bicycle which the intestate was riding, a certain instruction to the effect that the jury might find the intestate was not in the exercise of due care from the fact that "from any reason — his inexperience, perhaps, — for something that we know nothing about, — if he lost temporarily the control of that machine," was held to give the plaintiff no ground for exception. *McKechnie v. Boston Elevated Railway*, 36.

In the same case there was some evidence that the plaintiff's intestate in his manner of turning the corner from one street into another was violating a street traffic regulation, and the judge in instructing the jury in regard to this matter said, "Whether the boy knew the traffic regulation or not is of no consequence," and it was held that this instruction in the connection in which it was used was not erroneous. *Ibid.*

Article 3, § 1, of the street traffic regulations of the city of Boston, which provides that "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession," has no application to an automobile truck of the fire department which, in charge of a captain of the department, is upon a street merely in order that an employee of its manufacturer may instruct the fireman in its operation. *Lynch v. Boston Elevated Railway*, 93.

In an action against a street railway company by a captain in the fire department of a city who, when in charge of an automobile ladder truck and sitting beside the driver while an agent of the manufacturer of the truck was instructing members of the department how to handle it, was injured in a collision with a street car, negligently driven, it was held that a finding that the plaintiff was in the exercise of due care was not warranted, whether he be judged by his own conduct or by that of the driver of the truck. *Ibid.*

In an action against a street railway company for personal injuries alleged to have been received in a collision of the plaintiff's automobile with a street car of the defendant, it was held that on conflicting evidence answers of the jury to special questions were neither inconsistent nor unwarranted, and that, as both parties had been found therein to have used ordinary care, the plaintiff's misfortune was not attributable to the fault of the defendant. *Boyd v. Boston Elevated Railway*, 199.

Conduct of a pedestrian who was struck by a street car and killed previous to the enactment of St. 1914, c. 553, was held, in an action for causing his death, not to warrant a finding that at the time of the injury that caused his death he was actively in the exercise of due care as required by the statute. *Hayes v. Boston Elevated Railway*, 303.

In an action against the proprietor of a motor truck for personal injuries sustained from the wagon in which the plaintiffs were driving on a highway having been run into from behind by the motor truck driven by a servant of the defendant, it was held on the evidence that it could not have been ruled as matter of law that the defendant's driver was in the exercise of due care. *Massie v. Barker*, 420.

It also was held that the questions, whether surprise occasioned by the sally of a dog was such as reasonably to cause the driver to be governed for the instant by impulse rather than by sound judgment, or whether the exercise of due care required him to observe with greater accuracy the direction of his car, were for the jury. *Ibid.*

One travelling on foot in the evening on a public way may be found to have been in the exercise of due care when walking in the roadway because the sidewalk was muddy. *Booth v. Meagher*, 472.

At the trial of a suit by a woman sixty-one years of age against one who, while operating an automobile, ran into the plaintiff, who was walking on the side of the street because the sidewalk was muddy, it was held that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury. *Ibid.*

#### *Fire Apparatus.*

Article 3, § 1, of the street traffic regulations of the city of Boston, which provides that "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession," has no application to an automobile ladder truck of the fire department which, in charge of a captain of the department, is upon a street merely in order that an employee of its manufacturer may instruct the fireman in its operation. *Lynch v. Boston Elevated Railway*, 93.

In an action against a street railway company by a captain in the fire department of a city who, when in charge of an automobile ladder truck and sitting beside the driver while an agent of the manufacturer of the truck was instructing members of the department how to handle it, was injured in a collision with a street car, negligently driven, it was held that a finding that the plaintiff was in the exercise of due care was not warranted, whether he be judged by his own conduct or by that of the driver of the truck. *Ibid.*

#### *Bicycle.*

In an action under St. 1906, c. 463, Part I, § 63, by an administrator against a corporation operating a street railway for causing the death of the plaintiff's intestate by reason of a collision of a car of the defendant with a bicycle which the intestate was riding, a certain instruction to the effect that the jury might find the intestate not in the exercise of due care from the fact that "from any reason — his inexperience, perhaps, — for something that we know nothing about, — if he lost temporarily the control of that machine," was held to give the plaintiff no ground for exception. *McKechnie v. Boston Elevated Railway*, 36.

In the same case there was some evidence that the plaintiff's intestate in his

*Negligence (continued).*

manner of turning the corner from one street into another was violating a street traffic regulation, and the judge in instructing the jury in regard to this matter said, "Whether the boy knew the traffic regulation or not is of no consequence," and it was held that this instruction in the connection in which it was used was not erroneous. *McKecknie v. Boston Elevated Railway*, 36.

*In Railroad Station.*

Evidence as to conduct of the plaintiff in an action by a woman against a railroad corporation for personal injuries sustained, when St. 1914, c. 553, was in force, in a station of the defendant by falling over a portable step when the plaintiff was walking toward the train for which she had purchased a ticket, which was held not to show as matter of law that the plaintiff was negligent. *Regan v. Boston & Maine Railroad*, 418.

If, in such an action, it appears that the care of the use of such steps on the station platform was left by the defendant to the servants of the Pullman Company, the defendant is responsible for their negligence which results in harm to its passengers. *Ibid.*

On the evidence in such action it was held that it was a question for the jury whether the defendant was negligent in allowing the step to get out of place. *Ibid.*

*In a Freight Yard.*

Action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's employ during switching in a freight yard, where it was held that on the evidence the conductor was the only person who could have been found to have been negligent, and that consequently there could be no recovery. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

*In a Retail Store.*

If the proprietor of a retail drug store maintaining a soda counter has placed an upright weighing machine so near the entrance of the store that its low base or platform is in the path of customers passing in and out and a woman turning from the soda counter to pass out of the store stumbles over the base of the weighing machine and is injured, in an action against the proprietor for her injuries thus caused it can be found that the defendant was negligent. *Nye v. Louis K. Liggett Co.* 401.

*Of one controlling Real Estate.*

On the evidence at the trial of an action against one owning and controlling an apartment house by a tenant of one of the apartments for personal injuries sustained by reason of a defect in a common stairway, it was held that the question of the plaintiff's due care and of the defendant's negligence were for the jury. *Stagnaro v. Fitzgerald*, 265.

One, who places and maintains a stucco ornament negligently constructed and of improper materials on the front of a building belonging to him so

that it projects over a public sidewalk and constitutes a continuing nuisance dangerous to persons using the way, does not escape liability for injuries caused by pieces of the stucco breaking off and falling on persons passing below by letting the building to another and taking no precaution to guard against the danger or to provide that the tenant should do so. *Howard v. Central Amusement Co.* 344.

*Of Gas Company.*

In an action against a gas company for personal injuries sustained by reason of negligence of the defendant's servants in turning on the gas in the house occupied by the plaintiff without first stopping up an open gas pipe, it was held that under the circumstances the facts that two employees of the defendant, who had put in the meter in the cellar, tried to light the gas in the kitchen and left without returning to the cellar warranted a finding that they left the gas turned on. *Soulter v. Fall River Gas Works Co.* 53.

In the same case it was held that, on the evidence, if the defendant's employees left the gas turned on and the defendant sent the drip-man to pump out the drip without notifying him of that fact, that could have been found by the jury to have been an act of negligence, even if the reason for not notifying him was that the two employees had reported that they left the gas turned off. *Ibid.*

In the same case it was held that the jury were not bound to believe certain testimony of the drip-man, which was not contradicted, to the effect that it was no part of his duty to see that no jets were open, that he had a right to assume that the plaintiff had been using the gas "right along" and that he was sent to pump out the drip because of "poor pressure." *Ibid.*

In the same case conduct of the plaintiff in returning into the house when she knew the gas smelled stronger and stronger was held not as matter of law to show a failure to exercise ordinary care. *Ibid.*

*Dangerous Substance.*

In an action for personal injuries due to the negligence of the defendant's servant in placing a dangerous substance where it was likely to cause injury, it is no defence that the injuries also were due to the subsequent negligence of a third person. *Leahy v. Standard Oil Co. of New York*, 352.

One, who deposits a dangerous substance in a place where as a natural consequence injury ensues, is in no way excused from liability for the consequence of his wrongful act by the fact that the place of deposit was the land of a third person and not in his control. *Ibid.*

An employee, who is injured by reason of an explosion of a dangerous substance negligently placed on the land of his employer by another person, in an action against such person for his injuries is not debarred from recovery by the fact that negligence on the part of his employer contributed to his injury. *Ibid.*

A canner who buys lime from a manufacturer of that substance, packs it in cans and sells the cans of lime to retail dealers, is not liable for an injury caused by the explosion of one of the cans of lime, when it was being opened by a customer who had purchased it from a retail dealer, in the absence of

*Negligence (continued).*

evidence that lime is a dangerous substance or that the canner of the lime was negligent as to the manner of packing or sealing it in the can, and also in the absence of evidence that, if there was anything defective or dangerous in the composition of the lime, the canner had any reason to know of it. *Kusick v. Thorndike & Hix, Inc.* 413.

*In Maintenance of Steam Drilling System.*

Circumstances, under which a corporation which was constructing a dam used during a period of at least four months for the purpose of conducting steam to steam drills several stationary steam boilers set up in shacks and a system of steam pipes running from them to the drills, were held to show that the boilers and the pipes connected with them were permanent appliances so that the corporation owed to its employees the common law duty of maintaining such appliances in a reasonably safe condition and of warning those using them of perils attending their use. *Joyce v. Power Construction Co.* 496.

And where at the trial of the above described action there was evidence tending to show that the break was caused either by the sagging of the two inch pipe due to its being inadequately supported by reason of the negligence of fellow servants of the plaintiff, or by the chemical action upon the connecting threads at the joint of the two pipes of ashes in which pipes were buried, or to both causes acting concurrently, it cannot be ruled as a matter of law that the plaintiff's injuries were caused solely by the negligence of his fellow employees and therefore that he cannot recover and they might have been found to have been caused in part by a neglect of duty on the part of the defendant in failing properly to protect the pipe under the shack from the chemical action of the ashes. *Ibid.*

*In throwing Brick.*

Evidence at the trial of an action for personal injuries caused by the plaintiff being struck by a missile thrown by an employee of the proprietors of a circus who, while pulling up the stakes of the circus tent, was attempting to drive away a crowd of boys, upon which, it was held, it could be found that the person who threw the brick was acting within the scope of his employment in doing so, although the particular means he made use of might not have been contemplated by his employers. *Robinson v. Doe*, 319.

In the same case it was held that evidence that the employee of the defendants in driving the boys away said, "Get to . . . out of here" and made other similar remarks was admissible as evidence of statements accompanying and explaining his acts. *Ibid.*

*Conduct in an Emergency.*

In an action against the proprietor of a motor truck for personal injuries sustained from the wagon in which the plaintiffs were driving on a highway having been run into from behind by the motor truck driven by a servant of the defendant, it was held that the questions, whether surprise occasioned by the sally of a dog was such as reasonably to cause the driver of the truck

to be governed for the instant by impulse rather than by sound judgment, or whether the exercise of due care required him to observe with greater accuracy the direction of his car, were for the jury, who were at liberty to believe a part and discredit the rest of the driver's testimony. *Massie v. Barker*, 420.

#### *Intervening Act of Third Person.*

In an action for personal injuries due to the negligence of the defendant's servant in placing a dangerous substance where it was likely to cause injury, it is no defence that the injuries also were due to the subsequent negligence of a third person. *Leahy v. Standard Oil Co. of New York*, 352.

An employee, who is injured by reason of an explosion of a dangerous substance negligently placed on the land of his employer by another person, in an action against such person for his injuries is not debarred from recovery by the fact that negligence on the part of his employer contributed to his injury. *Ibid.*

#### *Causing Death.*

In an action under St. 1906, c. 463, Part I, § 63, by an administrator against a corporation operating a street railway for causing the death of the plaintiff's intestate by reason of a collision of a car of the defendant with a bicycle which the intestate was riding, a certain instruction to the effect that the jury might find the intestate was not in the exercise of due care from the fact that "from any reason — his inexperience, perhaps, — for something that we know nothing about, — if he lost temporarily the control of that machine," was held to give the plaintiff no ground for exception. *McKeehn v. Boston Elevated Railway*, 36.

Action against a corporation operating a street railway for causing the death of a passenger on a car of the defendant who was thrown from the car when it was entering upon a curve. *Halloran v. Boston Elevated Railway*, 280.

In an action for causing the death of a passenger on a street railway car, who was thrown from the car as it entered upon a curve, where a previous fracture of the deceased's skull was admitted, evidence that a fractured skull impairs equilibrium and that habits of alcoholic drinking, which he was shown to have had, still further impair equilibrium, was held rightly to have been excluded in the absence of evidence to show that the balance of mind or body of the intestate was less than normal at the time of the accident or that he was under the influence of liquor at that time. *Ibid.*

Conduct of a pedestrian who was struck by a street car and killed previous to the enactment of St. 1914, c. 553, was held, in an action for causing his death, not to warrant a finding that at the time of the injury that caused his death he was actively in the exercise of due care as required by the statute. *Hayes v. Boston Elevated Railway*, 303.

It was said that it was not necessary to pass upon the propriety of certain comments by a judge in his charge at the trial of an action against a street railway corporation for negligently causing the death of a traveller on the highway, as to the method of arriving at the penalty to be imposed on a defendant who was found guilty upon an indictment for manslaughter. *Ibid.*

Where, with the acquiescence of the plaintiff, an action against a railroad

*Negligence (continued).*

corporation under St. 1907, c. 392, for negligently causing the death of an employee of a mill corporation was tried together with an action against the mill corporation under St. 1909, c. 514, § 128, for causing the same death, and there was evidence of concurring negligence of both corporations and the jury were instructed that it was important for them to know that in case of a judgment against each defendant there could be but one satisfaction, it was held that the plaintiff was estopped from collecting more than one judgment. *D'Almeida v. Boston & Maine Railroad*, 452.

No opinion was expressed upon the question whether before the trial the plaintiff was entitled to have the action against each defendant for negligently causing the death of his intestate decided upon its own merits without regard to the fact that another action was pending against another defendant based upon the same fact. *Ibid.*

Action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's employ during switching in a freight yard, where it was held that on the evidence the conductor was the only person who could have been found to have been negligent, and that consequently there could be no recovery. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

*Wanton and Reckless Misconduct.*

Where an employee of a contractor with the acquiescence of a railroad corporation enters upon its property for the purpose of crossing a track to borrow a tool for his employer from the corporation and is struck and injured by a locomotive engine, he cannot recover in an action of tort against the corporation for his injuries so received without proving that his injuries were caused by wanton and reckless misconduct of the defendant or its employees. *Laporta v. New York Central Railroad*, 100.

*Res ipsa loquitur.*

Where an electric street railway car suddenly moves backward for a considerable distance just as passengers have entered it and then without a substantial interval of time moves forward, and where both motions are of such violence as to throw a passenger each time against some part of the car, this is so contrary to common experience in the ordinary operation of street cars as to warrant an inference of negligence in the operation of the car. *Sullivan v. Boston Elevated Railway*, 405.

The fact that a person was injured by the explosion of a can of lime when it was being opened is not in itself evidence that the canner who packed the lime in the can and put it on the market did so negligently. *Kusick v. Thorndike & Hix, Inc.* 413.

*Proximate Cause.*

In an action for personal injuries due to the negligence of the defendant's servant in placing a dangerous substance where it was likely to cause injury, it is no defence that the injuries also were due to the subsequent negligence of a third person. *Leahy v. Standard Oil Co. of New York*, 352.

Where the evidence, in an action by an employee against his employer for

personal injuries, made possible findings that the proximate cause of the action was either of two causes, one of which must have been due to negligence of fellow workmen of the defendant and the other to negligence of the defendant, it was held that it could not be ruled as a matter of law that the plaintiff's injuries were caused by negligence of his fellow workmen. *Joyce v. Power Construction Co.* 496.

### *Traffic Rules and Regulations.*

Article 3, § 1, of the street traffic regulations of the city of Boston, which provides that "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession," has no application to an automobile truck of the fire department which, in charge of a captain of the department, is upon a street merely in order that an employee of its manufacturer may instruct the fireman in its operation. *Lynch v. Boston Elevated Railway*, 93.

In an action for causing the death of a boy on a bicycle who was run into by a street railway car, there was some evidence that the plaintiff's intestate in his manner of turning the corner from one street into another was violating a street traffic regulation, and the judge in instructing the jury in regard to this matter said, "Whether the boy knew the traffic regulation or not is of no consequence," and that instruction in the connection in which it was used was held not to have been erroneous. *McKechnie v. Boston Elevated Railway*, 36.

### *Violation of Employer's Rules.*

In an action against a railroad corporation under the federal employers' liability statute for causing the death of a conductor it was held that certain rules of the defendant introduced by the plaintiff must be construed together. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

In the same case it was held that under such rules it was the duty of the engineer, unless he knew that the course adopted by the conductor would bring about a condition of danger, to follow the conductor's orders. *Ibid.*

### NEWBURYPORT.

Validity of certain taking, by the city of Newburyport under St. 1908, c. 403, for the purpose of its water supply, of a right to flow. *Lunt v. Newburyport*, 48.

### NEWSBOY.

Validity, construction and effect of an agreement by a news company to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks." *Bay State Street Railway v. North Shore News Co.* 323.



## NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

## NOTICE.

Under St. 1913, c. 577, as amended by St. 1914, c. 119, regulating the erection and maintenance of garages in the city of Boston, a notice must be mailed to each one of a number of tenants in common owning an abutting parcel of land. *Wright v. Lyons*, 167.

The giving of the notice required by the above statutes is a prerequisite to the jurisdiction of the board of street commissioners of Boston to grant the permit. *Ibid.*

## NUISANCE.

Enumeration by Rugg, C. J., of classes of cases illustrating the regulation, that properly may be delegated to the discretionary supervision of a local board, of occupations and of uses of property which may create nuisances. *Kilgour v. Gratto*, 78.

A suit in equity may be maintained to enjoin the erection and maintenance of a garage in the city of Boston on land adjoining that of the plaintiff without lawful authority under St. 1913, c. 577, as amended by St. 1914, c. 119, upon showing special damage suffered by the plaintiff by reason of noise, confusion, noisome odors and the storing of large quantities of inflammable and explosive material, although by the acts complained of a public nuisance also was created. *Wright v. Lyons*, 167.

One, who places and maintains a stucco ornament negligently constructed and of improper materials on the front of a building belonging to him so that it projects over a public sidewalk and constitutes a continuing nuisance to persons using the way, does not escape liability for injuries caused by pieces of the stucco breaking off and falling on persons passing below by letting the building to another and taking no precaution to guard against the danger or to provide that the tenant should do so. *Howard v. Central Amusement Co.* 344.

## OYSTERS.

See FISHERIES.

## PARENT AND CHILD.

In an action by a boy, who when coasting down a street "duly licensed for coasting" was injured by a horse belonging to the defendant and ridden by a minor son of the defendant, it was held that there was no evidence for the jury that the defendant's son was acting as the servant or agent of his father at the time of the plaintiff's injury. *Poirier v. Terceiro*, 435.

## PARTNERSHIP.

On a bill for an accounting brought by two retiring partners against three remaining partners who were to continue the business formerly carried on

by the firm, it appeared that there had been no bad faith on the part of any of the partners but that apparently from lack of care and diligence the bookkeeping and accounting were full of mistakes and errors, and that all the partners believed the business to have been prosperous and were deceived as to its real condition until this was revealed by the report of an expert accountant. It was held that a master properly refused to make a finding as to negligence of an overseeing partner, as the negligence of one partner had no bearing on the questions to be determined. *Hurter v. Larrabee*, 218.

It also was held that under the circumstances disclosed the only course open to the master was to correct the errors so far as possible and from all credible evidence ascertain the true condition of the partnership. *Ibid.*

So far as losses result to a partnership from errors of judgment of one partner not amounting to fraud, bad faith or reckless disregard of his obligations, they must be borne by the partnership. *Ibid.*

In the case above stated it appeared that the termination of the partnership took effect on the first day of January of a certain year, and it was held that the taxes assessed upon the partnership property as of the preceding first day of April were expenses to be borne wholly by the partnership, there being nothing in the partnership agreement indicating any apportionment of such taxes between the firm and the continuing partners. *Ibid.*

In the same case it was held that the expense of the expert accountant employed to examine and report on the books of the firm was charged rightly to the partnership, the results of his work being equally available to all the partners. *Ibid.*

#### PASSENGER.

Actions for personal injuries suffered by passengers, see appropriate subtitles under CARRIER and NEGLIGENCE.

#### PAYMENT.

Where the maker of a check that had been deposited in a bank by the payee stopped payment of it and, after payment was refused, one acting in behalf of the payee deposited in the bank to his own credit his own check for an amount sufficient to cover the payment of the unpaid check as security to guarantee the bank against loss in enforcing payment of the unpaid check, whereupon the bank put the deposited check through the clearing house in the usual way and held the proceeds of that check in place of the check itself, it was held that this did not constitute payment of the unpaid check and that, in an action brought by the bank upon such unpaid check against its maker, these facts were not admissible as evidence of payment or on any other ground of defence. *International Trust Co. v. Paige Motor Car Co.* 95.

The mere facts, that an agent of a life insurance company took to a beneficiary under a policy a check payable to the beneficiary's order for the amount to which he was entitled, that the beneficiary indorsed it by signing his mark on the back and that the agent then took it away because the beneficiary wanted cash and not a check, are not conclusive evidence of payment to the beneficiary of the amount due to him. *Shea v. Manhattan Life Ins. Co.* 112.

## PLEADING, CIVIL.

### *Special Appearance.*

Special appearance by a non-resident was not waived when, having excepted to a ruling that he could not defend only as to his property that was attached but must answer generally, he answered generally. *Cheshire National Bank v. Jaynes*, 14.

The provision of R. L. c. 173, § 118, relates only to the effect of a general appearance and answer to the merits where the defendant's rights have not been saved by previous pleadings. *Ibid.*

### *Declaration.*

There is no objection to the combination, in a declaration in an action of tort or contract, of a count for the conversion of money with a count for money had and received and a count upon an account annexed, all being for the same cause of action. *Flye v. Hall*, 528.

It is not necessary to use in a declaration the same detail of description of a cause of action that is called for in the presentation of evidence. *Ibid.*

As to certain essential allegations in the declaration in an action of contract against a stockbroker under R. L. c. 99, § 4. *Matthys v. Hornblower*, 248.

### *Bill of Particulars.*

Where all the particulars necessary to a clear understanding of a cause of action are set forth in a declaration, they need not be repeated in a bill of particulars. *Flye v. Hall*, 528.

### *Amendment.*

See appropriate subtitle under PRACTICE, CIVIL.

## PLEADING, CRIMINAL.

### *Complaint or Indictment.*

The averment of a previous conviction of a certain crime is an essential part of the description of the crime of having committed a second or other subsequent crime of the same nature, and such an averment must be included in the complaint or indictment for the subsequent crime in order to support a sentence for the repeated offence. *Walsh v. Commonwealth*, 39.

Under R. L. c. 218, §§ 38, 67, an indictment charging that the defendant "did steal money" is a sufficient indictment for larceny by false pretences. *Commonwealth v. Carver*, 42.

### PLEDGE.

For the purposes of the interpretation of the tax act, pledged property, tangible as well as intangible, is deemed to be owned by the one in possession, whether this is a domestic or a foreign corporation or a natural person. *Boston Loan Co. v. Commonwealth*, 181.

Under St. 1909, c. 490, Part III, § 43, the tax commissioner when ascertaining, for the purpose of imposing the excise authorized by the statute, the value of the corporate franchise of a domestic corporation engaged in the business of lending money at interest secured by pledges of articles of personal property of which it holds possession while the general title to the articles is in its customers, in computing the maximum limit of twenty per cent of the value of the things named in the statute must include under the word "merchandise" the articles of personal property thus held in pledge. *Boston Loan Co. v. Commonwealth*, 181.

Deposit by the owner of shares in a foreign corporation, with a stockbroker as additional margin to secure his account, of his certificate with his signature on the back but not to a power of attorney to transfer and without compliance with the requirements of the foreign law in regard to transfers of shares, was held not sufficient to enable a trust company to whom the stockbroker had pledged the shares to maintain a bill in equity to compel a transfer of shares to it, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

Provisions of a "trust receipt," given to a bank by an importer of hides, were held not to operate as a pledge of the hides, because they never were delivered to the bank. *Peoples National Bank v. Mulholland*, 448.

By reason of an instrument of assignment by a trust company which in good faith had taken as collateral security for a loan an instrument purporting to be a certificate for shares in a street railway corporation which instrument was identified as part of an attempted fraudulent over-issue of stock of the street railway corporation, it was held that a right of action of the trust company against the street railway corporation, based on the ground that the street railway corporation was estopped to deny that the trust company was a holder of its shares, passed to the assignees and no longer belonged to the trust company. *Smith v. Worcester & Southbridge Street Railway*, 564.

And it was held that the trust company could not maintain a suit in equity to compel the street railway corporation to issue to it a new certificate for the number of shares named in the instrument. *Ibid.*

#### POLICE, DISTRICT AND MUNICIPAL COURTS.

Under R. L. c. 160, §§ 11, 36; c. 161, § 5, an assistant clerk of a district court has authority to receive a complaint addressed to the court and to administer the oath to the complainant. *Commonwealth v. Searnis*, 597.

#### POOR DEBTOR.

St. 1906, c. 203, § 1, relating to the examination of a judgment debtor preliminary to an order for his arrest on execution, is constitutional and is not in violation of the Declaration of Rights, arts. 1, 10, 11, 30. *Simon v. Justices of the Municipal Court*, 122.

It also was held that the statute was a law regulating rights of property and liberty within constitutional limits. *Ibid.*

Where, as to such an examination, the judge ordered that, while the judge was in a room near or adjoining, a stenographer provided by the creditor's coun-

Poor Debtor (*continued*).

sel should take a complete record of the questions and answers and should prepare a typewritten transcript thereof for each counsel, that, after these transcripts had been examined fully by the parties, such changes might be made as would make the questions and answers conform to the truth, and that then the questions and answers should be read to the judge in the presence of the debtor and should be signed and sworn to by him, it was held that this procedure was judicial and that the statute in authorizing it was not an encroachment by the legislative upon the judicial department of the government. *Simon v. Justices of the Municipal Court*, 122.

In a case where the procedure above described was followed, the judge refused to put the stenographer under oath, and it was held that the refusal was proper, because the duties of the stenographer were such that there was no occasion for her being sworn. *Ibid*.

It also was held that this procedure conformed to established and appropriate methods of procuring and presenting evidence. *Ibid*.

## PRACTICE, CIVIL.

### *Parties.*

In a proceeding under St. 1913, c. 784, § 28, by the public service commission to enforce an order directing a telegraph company to cease certain acts of discrimination, where the company attempted to justify its conduct by reason of a contract which it had with the New York Stock Exchange, it was held that it was not necessary that the New York Stock Exchange or its officers or members should be made parties. *Western Union Telegraph Co. v. Foster*, 365.

### *Service of Process.*

It was not disputed that an attempted service by trustee process upon an alleged trustee merely by serving the writ upon another as his agent is insufficient. *Reynolds v. Missouri, Kansas & Texas Railway*, 253.

Facts relating to a resident passenger agent, which were held to warrant a finding that a railroad corporation organized under the laws of another State was engaged in business in as well as soliciting business in this Commonwealth, so that under St. 1913, c. 257, such corporation might be served with process in the manner provided for service in actions against domestic corporations. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

### *Amendment.*

If a jury, in an action where the plaintiff is entitled to interest, return a verdict for the plaintiff in a certain sum "with interest," the presiding judge has power, before the verdict is recorded, to order the amount of the verdict to be amended by the addition of interest. *Fondi v. Boston Mutual Life Ins. Co.* 6. St. 1905, c. 263, did not take away the power of the Supreme Judicial Court under R. L. c. 173, § 52, to allow an amendment changing a suit in equity in that court into an action at law. *Kerr v. Whitney*, 120.

Where an action on a covenant in a lease to pay rent was brought by a receiver in his name as receiver, and it was held that the defendant was liable on the

covenant to the lessor whose property was in the hands of the receiver but it was plain that the receiver was not an assignee of the lease, this court under St. 1913, c. 716, § 3, gave the plaintiff leave to amend by substituting the name of the lessor as plaintiff and ordered that, upon the filing of the amendment, a finding for the plaintiff should be affirmed. *Noble v. Brooks*, 288.

#### *Dissolution of Attachment.*

Where an attachment by trustee process has been dissolved by the giving of a bond with sufficient sureties approved by a master in chancery after notice and hearing given and conducted in pursuance of the requirements of R. L. c. 167, §§ 116, 117, the creditor of the trustee who was the defendant in the action in which the attachment by trustee process was made immediately may sue his debtor who was summoned as trustee without any further demand after the dissolution of the attachment. *Neszy v. Beard*, 305.

There is nothing in the Revised Laws nor elsewhere which requires that one who has been summoned as trustee by trustee process should receive any notice of an application by the defendant to a magistrate to dissolve the attachment. *Ibid.*

#### *Joint Defendants.*

Where the owner and the tenant of a building were sued jointly for personal injuries caused by negligence in the construction and maintenance of the building, and at the trial of the action the jury, on evidence amply warranting such findings, returned a verdict for the defendant tenant and for the plaintiff against the defendant owner, an exception of the owner to a refusal of the presiding judge to rule that the plaintiff could not recover on the allegations of joint liability in the declaration must be overruled. *Howard v. Central Amusement Co.* 344.

#### *Severance of Joint Liability by Death.*

A joint liability in contract is severed by the death of one of the joint promisors and thereupon the promisee may proceed severally either against the surviving promisor or against the representative of the estate of the deceased promisor. *American Surety Co. of New York v. Vinton*, 337.

#### *Law of the Case.*

Where a non-resident defendant, on whom no personal service had been made but whose property had been attached by trustee process, appeared specially for the sole purpose of protecting his rights in the attached property, but the trial judge ruled that if the defendant desired to contest the case he must answer generally and submit himself to the jurisdiction of the court, and the defendant then, after having excepted to the ruling of the judge, answered generally and filed cross interrogatories for the taking of a deposition without further questioning the jurisdiction of the court, the defendant by this compliance with the ruling of the judge, which until reversed was the law of the trial, did not waive his special appearance nor his exception based on it. *Cheshire National Bank v. Jaynes*, 14.

*Interrogatories.*

Where in cross-examination a plaintiff testifies that her answers to interrogatories propounded under the statute, which were different from her statements made under direct examination, are correct and absolutely true notwithstanding anything that she has testified to on the witness stand, this is not to be treated as a mere instance of conflicting or inconsistent statements made upon cross-examination, and the plaintiff is to be bound by the statement last given as the truth. *Sullivan v. Boston Elevated Railway*, 405.

*Rules of Court.*

Rule 44 of the Superior Court. *Matter of Carver*, 169.

Rule 45 of the Superior Court. *Ibid.*

*Cases tried together.*

Where a number of cases, brought by the same plaintiff against different defendants on separate fire insurance policies for a loss arising from the destruction of the same property by the same fire, were tried together and a verdict was returned for the plaintiff in each of the cases, it was held that a single bill of exceptions presented jointly by all the defendants properly might be allowed. *Doherty v. Phoenix Ins. Co.* 310.

*Auditor.*

Auditor's findings in an action of contract against a stockbroker were held not to have been inconsistent with each other. *Mathys v. Hornblower*, 248.

The findings of the auditor in the above described case being the only evidence upon the issue to which they related, a verdict was held properly to have been ordered for the defendant because as a matter of law he had sustained the burden of proving under R. L. c. 99, § 4, that all the purchases and sales upon orders placed with him by the plaintiff were "actual." *Ibid.*

The fact that a witness had testified for the plaintiff before an auditor was held not to make him the plaintiff's witness at the trial before the jury, so that portions of his testimony before the auditor properly were admitted in contradiction of his statements as a witness by deposition, where it appeared that after the hearing before the auditor he had become employed by the defendant. *Nelson v. Imperial Water Proof Co. Ltd.* 388.

See AUDITOR.

*Conduct of Trial.*

Curing error in admission of evidence.

Error of a presiding judge, in admitting testimony of an expert on a subject which was not a proper one for expert testimony, was held to have been cured when of his own motion he called the attention of the jury to the fact that the opinion of the expert witness above mentioned was immaterial and with appropriate instructions ordered that the question and answer should be stricken out. *Halloran v. Boston Elevated Railway*, 280.

## Requests, rulings and instructions.

An error of a judge presiding at the trial of an action upon a policy of life insurance, in instructing the jury that the burden of proof rested upon the defendant to show that the policy had been avoided by breach of a condition precedent that at its date the insured was in good health, is not cured by a further instruction that, if it appeared to the minds of the jury that the insured "was not in sound health at the time when the policy was taken out, then by the express terms of the policy there could be no recovery." *Fondi v. Boston Mutual Life Ins. Co.* 6.

A presiding judge properly may refuse to make a ruling that is based on the assumption of the truth of the testimony of witnesses called by the party asking for the ruling which the jury are not bound to believe. *Soulier v. Fall River Gas Works Co.* 53.

Where the judge presiding at a trial erroneously gave a certain instruction limiting the amount of recovery by the plaintiff to a sum less than he claimed, and the jury found for the plaintiff in the full amount claimed by him without making any deduction, it was held that the defendant was not harmed by the judge's error in its favor. *Shea v. Manhattan Life Ins. Co.* 112.

Colloquy of a judge and counsel for a defendant with regard to the judge not giving in terms certain rulings and instructions asked for by the defendant, ending by the counsel saying, "I am content," as to which it was held that the defendant's counsel had stated to the judge his satisfaction with the manner in which his requests had been dealt with, that therefore no exception was taken and a bill of exceptions of the defendant should have been disallowed. *Herrick v. Waitt*, 415.

## Judge's charge.

Erroneous charge of a judge in commenting on a statement previously made in writing by one of the plaintiff's witnesses, which was held later to have been withdrawn by the judge and thereby to have been cured. *McKechnie v. Boston Elevated Railway*, 36.

It was said that it was not necessary to pass upon the propriety of certain comments by a judge in his charge at the trial of an action against a street railway corporation for negligently causing the death of a traveller on the highway, as to the method of arriving at the penalty to be imposed on a defendant who was found guilty upon an indictment for manslaughter. *Hayes v. Boston Elevated Railway*, 303.

Comment by a judge in his charge to the jury as to inferences that might be drawn from the absence of an employee of the defendant as a witness, as to which it was held that, while the judge well might have omitted the instruction, it could not be held to have been erroneous. *Robinson v. Doe*, 319.

Charge of a judge, in an action upon a policy of accident insurance, that "All parties to a contract, whatsoever contract it may be, who sign it or accept it, are presumed to know the terms thereof; but this presumption is not conclusive," as to which it was held that in the connection in which it was used and must have been understood, the statement of the judge was correct. *Collins v. Casualty Co. of America*, 327.

In an action of tort for personal injuries, where the charge of the presiding judge contained a correct statement of the law applicable to the case and



Practice, Civil (*continued*).

was deficient only, if at all, in not undertaking to define by illustration the circumstances under which an act of negligence is the cause of an injury, but where that objection to the charge was not brought to the attention of the judge at the trial, the objection is not open to the excepting party upon an exception to the portion of the charge in question on the ground that it does not state the law correctly. *Leahy v. Standard Oil Co. of New York*, 352.

In the action of tort mentioned above it was said that whether one thing was the cause of another is a question of fact on which little help can be given to a jury in the judge's charge except by way of illustration. *Ibid*.

#### Amendment of verdict.

If a jury, in an action where the plaintiff is entitled to interest, return a verdict for the plaintiff in a certain sum "with interest," the presiding judge has power, before the verdict is recorded, to order the amount of the verdict to be amended by the addition of interest. *Fondi v. Boston Mutual Life Ins. Co.* 6.

#### Verdict.

If a jury, in an action where the plaintiff is entitled to interest, return a verdict for the plaintiff in a certain sum "with interest," the presiding judge has power, before the verdict is recorded, to order the amount of the verdict to be amended by the addition of interest. *Fondi v. Boston Mutual Life Ins. Co.* 6.

Where the judge presiding at a trial erroneously gave a certain instruction limiting the amount of recovery by the plaintiff to a sum less than he claimed, and the jury found for the plaintiff in the full amount claimed by him without making any deduction, it was held that the defendant was not harmed by the judge's error in its favor. *Shea v. Manhattan Life Ins. Co.* 112.

Indorsement by a judge upon a motion for a new trial which was held to mean that the verdict was set aside as a whole and that the new trial was ordered upon all the issues in the case and was not limited to the question of the amount of damages. *Tildsley v. Boston Elevated Railway*, 117.

#### New Trial.

Indorsement by a judge upon a motion for a new trial which was held to mean that the verdict was set aside as a whole and that the new trial was ordered upon all the issues in the case and was not limited to the question of the amount of damages. *Tildsley v. Boston Elevated Railway*, 117.

A contention, in an action by a son against the executors of his father's will upon a contract in writing promising certain specific property to the son if he would manage the father's farm in the father's old age, that, under the circumstances, the plaintiff by accepting the benefits given by the will had exercised an election to ratify its provisions, which was introduced by the defendants for the first time at the argument before this court, was held not open upon the exceptions before this court, but it was said that, before the entry of final judgment, the defendants had the right to move in the Superior Court for a new trial on the ground "that, by mistake of parties or

counsel, . . . a question of fact which is essential to the determination of the rights of the parties has not been tried." *Noyes v. Noyes*, 125.

No exception lies, at the hearing of a motion for a new trial, to a ruling upon a question which was or might have been raised at the trial. *Matter of Carver*, 169.

A motion for a new trial, on the ground that the verdict was against the law as stated to the jury by the judge, that it was against the evidence and the weight of evidence, that special findings of the jury were inconsistent and that on the evidence one or the other of the findings must be wrong, was held properly to have been denied within the discretionary power of the judge. *Boyd v. Boston Elevated Railway*, 199.

On a motion for a new trial on the ground of newly discovered evidence it was held that the evidence was not newly discovered, and that there was nothing to show an abuse of discretion on the part of the judge in denying the motion. *Herrick v. Waitt*, 415.

Where, at the trial of an action of replevin by a seller against an assignee for the benefit of creditors of the buyer for the return of the goods on the ground that at the time of the sale the buyer had an actual but undisclosed intention not to pay for the goods, the judge orders a verdict for the defendant and, on exceptions by the plaintiff, it appears that the goods were sold in two parcels at dates a month apart, and that the evidence would not warrant a finding for the plaintiff as to the first sale but would warrant such a finding as to the second, the verdict as to the first sale should stand, but a new trial may be had, confined to the question of recovery of the goods included in the second sale. *Phinney v. Friedman*, 531.

#### *Report by Judge.*

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a judge of the Land Court has no power to report questions of law for determination by this court until the case reported is ripe for the entry of a final decree in the Land Court. *Riverbank Improvement Co. v. Chapman*, 424.

#### *Exceptions.*

Allowance, disallowance or dismissal.

When a bill of exceptions is presented to a trial judge for allowance, it is his duty to allow or to disallow it, and in disallowing it he may, if he deems it necessary, state his reasons in the certificate of disallowance. *Doherty v. Phoenix Ins. Co.* 310.

Where a judge allowed a bill of exceptions and in his certificate of allowance described a motion to dismiss the exceptions on the ground that they were not filed seasonably, on which he had not acted, this court said that a motion could have been made in this court to dismiss the exceptions for want of jurisdiction but that the motion to dismiss the exceptions filed in the trial court properly could not be considered by this court because it never had been passed upon by the trial judge. *Ibid.*

Formal allowance by a judge of an exception which had not been taken did not bring the exception into existence. *Herrick v. Waitt*, 415.

Practice, Civil (*continued*).

When exception lies; matters of discretion.

No exception lies, at the hearing of a motion for a new trial, to a ruling upon a question which was or might have been raised at the trial. *Matter of Carver*, 169.

In an action where the genuineness of a signature of a deceased person was in issue, this court overruled an exception to the admission of testimony that the signature was genuine by a witness, although the court was of opinion that it would have been a wiser exercise of discretion not to permit him to testify. *Noyes v. Noyes*, 125.

Whether exception saved.

Colloquy of judge and counsel for a defendant with regard to the judge not giving in terms certain rulings and instructions asked for by the defendant, ending by the counsel saying, "I am content," as to which it was held that the defendant's counsel had stated to the judge his satisfaction with the manner in which his requests had been dealt with, that therefore no exception was taken and a bill of exceptions of the defendant should have been disallowed. *Herrick v. Waitt*, 415.

It also was held that the judge by his formal allowance of the bill of exceptions could not bring into existence, to affect the rights of the plaintiff, exceptions that never had been taken. *Ibid.*

If the respondent in proceedings for the disbarment of an attorney at law, who at the hearing on the petition made no requests for rulings and took no exceptions, sixteen days after an order by the trial judge disbarring him procures an extension of time for the filing of a bill of exceptions and then within the extended time files a bill of exceptions in which for the first time he claims an exception to the findings and order of the judge, Rule 45 of the Superior Court requires that the bill shall be disallowed. *Matter of Carver*, 169.

What objections are open; insufficient bill.

Contention, raised for the first time at the argument of exceptions in this court, was held not to be open. *Noyes v. Noyes*, 125.

Exception to the exclusion of evidence was overruled because the excepting party failed to state in its bill of exceptions the evidence which, it contended, raised the issue to which the evidence excluded was relevant, and the reason given for such failure, that as the issue was left to the jury it was to be presumed that there was some evidence on both sides, did not help the court to determine the relevancy of the evidence excluded. *Doherty v. Phoenix Ins. Co.* 310.

In an action of tort for personal injuries, where the charge of the presiding judge contained a correct statement of the law applicable to the case and was deficient only, if at all, in not undertaking to define by illustration the circumstances under which an act of negligence is the cause of an injury, but where that objection to the charge was not brought to the attention of the judge at the trial, the objection is not open to the excepting party upon an exception to the portion of the charge in question on the ground that it does not state the law correctly. *Leahy v. Standard Oil Co. of New York*, 352.

Whether error was harmful.

Where the judge presiding at a trial erroneously gave a certain instruction limiting the amount of recovery by the plaintiff to a sum less than he claimed, and the jury found for the plaintiff in the full amount claimed by him without making any deduction, it was held that the defendant was not harmed by the judge's error in its favor. *Shea v. Manhattan Life Ins. Co.* 112.

In an action, where the genuineness of the signature of a deceased person was a material issue, this court was of opinion that testimony of a certain witness that the signature in question was genuine should have been excluded on the ground that the witness did not have sufficient knowledge to qualify him as a witness on the subject, but under the circumstances it was held that the error had not affected injuriously the substantial rights of the adverse party and that therefore under St. 1913, c. 716, § 1, the exception to the admission of the evidence should be overruled. *Noyes v. Noyes*, 125.

An exception to the exclusion of a question at a trial will not be sustained where there is no offer of proof to show what answer to the question was expected. *Matthys v. Hornblower*, 248.

Error of a presiding judge, in admitting testimony of an expert on a subject which was not a proper one for expert testimony, was held to have been cured when of his own motion he called the attention of the jury to the fact that the opinion of the expert witness above mentioned was immaterial and with appropriate instructions ordered that the question and answer should be stricken out. *Halloran v. Boston Elevated Railway*, 280.

Where the owner and the tenant of a building were sued jointly for personal injuries caused by negligence in the construction and maintenance of the building, and at the trial of the action the jury, on evidence amply warranting such findings, returned a verdict for the defendant tenant and for the plaintiff against the defendant owner, an exception of the owner to a refusal of the presiding judge to rule that the plaintiff could not recover on the allegations of joint liability in the declaration must be overruled. *Howard v. Central Amusement Co.* 344.

Whether error cured.

An error of a judge presiding at the trial of an action upon a policy of life insurance, in instructing the jury that the burden of proof rested upon the defendant to show that the policy had been avoided by breach of a condition precedent that at its date the insured was in good health, is not cured by a further instruction that, if it appeared to the minds of the jury that the insured "was not in sound health at the time when the policy was taken out, then by the express terms of the policy there could be no recovery." *Fondi v. Boston Mutual Life Ins. Co.* 6.

Erroneous charge of a judge in commenting on a statement previously made in writing by one of the plaintiff's witnesses, which was held later to have been withdrawn by the judge and thereby cured, and which therefore afforded no ground for exception. *McKechnie v. Boston Elevated Railway*, 36.

Burden of proving error.

On an exception to the exclusion of a question to a witness the burden is on the excepting party to show that the answer to the question, as the judge

Practice, Civil (*continued*).

understood the question and as he had a right to understand it, was competent. *Crane Co. v. Pension*, 135.

Cases tried together.

Where a number of cases, brought by the same plaintiff against different defendants on separate fire insurance policies for a loss arising from the destruction of the same property by the same fire, were tried together and a verdict was returned for the plaintiff in each of the cases, it was held that a single bill of exceptions presented jointly by all the defendants properly might be allowed. *Doherty v. Phoenix Ins. Co.* 310.

Effect of pendency of exceptions.

The provisions of R. L. c. 173, §§ 79, 109, that in an action at law where exceptions have been filed judgment shall not be entered unless the exceptions are adjudged immaterial, frivolous or intended for delay, have no application to disbarment proceedings, in which an order for the disbarment of the accused attorney properly may be entered while exceptions taken by him are pending. *Matter of Allin*, 9.

Special appearance by a non-resident was not waived when, having excepted to a ruling that he could not defend only as to his property that was attached but must answer generally, he answered generally. *Cheshire National Bank v. Jaynes*, 14.

The provision of R. L. c. 173, § 118, relates only to the effect of a general appearance and answer to the merits where the defendant's rights have not been saved by previous pleadings. *Ibid.*

### *Appeal.*

Under Rule 44 of the Superior Court, a clerk of the Superior Court must decline to enter an appeal by a respondent from an order entered in disbarment proceedings if the appeal is not presented within twenty days after the order is made. *Matter of Carver*, 169.

One who is summoned as trustee by trustee process is a party to the action, and an order discharging him is a final judgment so far as he is concerned, he having no interest in the principal controversy. Therefore an appeal from such an order may be entered in this court without waiting until the action is disposed of on its merits and is ready for judgment. *Reynolds v. Missouri, Kansas & Texas Railway*, 253.

The above decision was confined strictly to the facts of the case and does not narrow the general rule as to appeals from interlocutory orders illustrated in *Weil v. Boston Elevated Railway*, 216. *Ibid.*

### *Judgment under St. 1909, c. 236.*

Upon exceptions by the defendant in an action of contract with a declaration in two counts, where a judge sitting without a jury failed to act upon requests by the defendant for certain rulings which applied to both counts but ordered judgment for the plaintiff on the second count, and this court were of opinion that the plaintiff could not maintain his action upon either count, it was held that, under St. 1909, c. 236, judgment should be entered for the defendant upon both counts. *Palmer v. Guillow*, 1.

*Costs and Counsel Fees.*

Under R. L. c. 189, § 69, if a person attempted to be summoned by trustee process as trustee is discharged by an order of the court because the service upon him was insufficient, he may be awarded costs and counsel fees by the order of discharge. *Reynolds v. Missouri, Kansas & Texas Railway*, 253.

*Proceedings in Land Court.*

See LAND COURT.

*Disbarment Proceedings.*

See ATTORNEY AT LAW, *Disbarment*.

## PRACTICE, CRIMINAL.

*Conduct of Trial.*

At the trial of an indictment for procuring an abortion, the discretion of the presiding judge as to permitting the Commonwealth to cross-examine or lead its own witness, the nurse, could not be said to have been exercised so as manifestly to have prejudiced the defendant. *Commonwealth v. Turner*, 229.

*Trial together of two Indictments against same Defendant.*

Whether one, who is the defendant in two indictments, one charging the forging and uttering of a promissory note and the other the larceny of money, where it appears that the money alleged to have been stolen was procured by false representations as to the good standing and signatures of persons whose names were written upon the note by the defendant, is entitled to a separate trial on each indictment, was not decided in a case where it appeared that the defendant consented to be tried on both indictments at one trial. *Commonwealth v. Carver*, 42.

*New Trial.*

A motion for a new trial after a verdict of guilty upon an indictment under R. L. c. 212, § 15, for using unlawful means with intent to procure the miscarriage of a woman, is based upon the ground of the wrongful admission of testimony of one of the witnesses of the Commonwealth, as to whom in his opening the prosecuting officer had stated that he anticipated "difficulty in getting the truth from this woman," and on the ground that, in his closing argument, the same officer had referred to the same witness as "an abortionist nurse," a denial of which was held not to have been an abuse of discretion by the presiding judge. *Commonwealth v. Turner*, 229.

*Exceptions.*

Where, after the trial of an indictment and the return of a verdict of guilty, no sentence is imposed and stayed under R. L. c. 220, § 3, and no report is

Practice, Criminal (*continued*).

made by the presiding judge under R. L. c. 219, § 34, exceptions saved by the defendant at the trial cannot be brought before this court by a bill of exceptions. *Commonwealth v. Carver*, 42.

#### *Sentence.*

It is erroneous, upon a complaint under R. L. c. 91, § 113, charging the defendant with having taken clams within prohibited bounds and containing no averment of a previous conviction for a like offence, to impose a sentence for more than a first offence, although in fact there may have been previous convictions which, if averred and proved, would have warranted the imposition of a greater sentence. *Walsh v. Commonwealth*, 39.

R. L. c. 193, § 12, does not deprive this court of its power, when error in the sentence is disclosed and it is apparent that the defendant has suffered enough for the crime of which he was convicted, to reverse the judgment of sentence and discharge the prisoner. *Ibid.*

Application of the foregoing principle where a sentence, directing the payment of a fine of \$50 and ordering that the defendant stand committed until the fine was paid, was imposed upon a complaint for a violation of R. L. c. 91, § 113, in having taken clams within prohibited bounds, for which no fine larger than \$10 should have been imposed. *Ibid.*

#### *Writ of Error.*

R. L. c. 193, § 12, does not deprive this court of its power, when error in the sentence is disclosed and it is apparent that the defendant has suffered enough for the crime of which he was convicted, to reverse the judgment of sentence and discharge the prisoner. *Walsh v. Commonwealth*, 39.

Application of the foregoing principle where a sentence, directing the payment of a fine of \$50 and ordering that the defendant stand committed until the fine was paid, was imposed upon a complaint for a violation of R. L. c. 91, § 113, in having taken clams within prohibited bounds, for which no fine larger than \$10 should have been imposed. *Ibid.*

### PRESCRIPTION.

See ADVERSE POSSESSION OR USE.

### PROBATE COURT.

#### *Jurisdiction.*

The proper place for the allowance of all expenses incurred and disbursements made in the proper execution of his trust by a guardian, executor, administrator, trustee or other fiduciary appointed by a probate court is in the account of his administration to the court appointing him. *Ensign v. Fazon*, 145.

Reasons alleged for an appeal from a decree of a probate court allowing in a guardian's account certain items for expenses, disbursements and services in connection with an unsuccessful appeal by the guardian from a decree

discharging him from his trust on the ground that the ward no longer was insane, were held to be sufficient in statement to permit the consideration by this court of an objection to the items because the guardian had no right to appeal from the decree discharging him from his trust on the ground that his ward no longer was insane and because the court had no jurisdiction to consider such an appeal. *Ensign v. Faxon*, 145.

Such an objection on the part of the ward is not a collateral attack upon the jurisdiction of the appellate court, the question at the hearing on the accounts being, whether the items were for charges properly incurred, and the burden being upon the guardian to show that they were incurred lawfully in the administration of his trust. *Ibid.*

The provisions of R. L. c. 162, § 44, relating to the awarding of costs and expenses in cases which are contested before a probate court or before the supreme court of probate do not limit the power or jurisdiction of the probate courts to allow to fiduciaries appointed by that court items of expenses and disbursements properly incurred by them in such cases, but are merely supplementary thereto. *Ibid.*

#### *Appeal.*

A guardian of an insane person is not "a person who is aggrieved," within the meaning of R. L. c. 162, § 9, by a decree of the probate court discharging him from his trust as guardian because the ward no longer is insane, and therefore has no right of appeal therefrom. *Ensign v. Faxon*, 145.

It here was intimated that heirs presumptive of the ward might have a right of appeal from such a decree. *Ibid.*

Reasons alleged for an appeal from a decree of a probate court allowing in a guardian's account certain items for expenses, disbursements and services in connection with an unsuccessful appeal by the guardian from a decree discharging him from his trust on the ground that the ward no longer was insane, were held to be sufficient in statement to permit the consideration by this court of an objection to the items because the guardian had no right to appeal from the decree discharging him from his trust on the ground that his ward no longer was insane and because the court had no jurisdiction to consider such an appeal. *Ibid.*

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A ward is not estopped to raise an objection to items of expense in his guardian's account on the ground that they were incurred in an appeal from a decree discharging the guardian which the court had no jurisdiction to entertain, merely because at no time during the proceedings where the expenses were incurred, which were long and expensive, did the ward object that the guardian's conduct in appealing was legally unwarranted or that the court lacked jurisdiction to entertain the appeal. *Ibid.*

On the record on an appeal from a decree of a single justice of this court affirming a decree of a probate court allowing in the account of a guardian of an insane person certain items for expenses and disbursements incurred by the guardian in opposing in the probate court a successful petition of



Probate Court (*continued*).

the ward to be discharged from guardianship, it was held that the decree must be affirmed because it could not be said as a matter of law that the items could not have been allowed properly. *Ensign v. Faxon*, 145.

Under R. L. c. 162, § 15, which provides that probate appeals "shall be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases," a reference of a probate appeal to an auditor "to hear the parties and their evidence, to find the facts, and report the same to the court" will be treated as a reference to a master and the auditor's report will be treated as a master's report. *Chapman v. Chapman*, 427.

### PROXIMATE CAUSE.

Bodily injury causing a rupture, followed by a necessary and successful operation, and later by death through "obscure physiological poisoning due to unknown changes in the bodily functions brought about by etherization," were held to be the cause of the death in an action upon a policy of accident insurance. *Collins v. Casualty Co. of America*, 327.

In an action for personal injuries due to the negligence of the defendant's servant in placing a dangerous substance where it was likely to cause injury, it is no defence that the injuries also were due to the subsequent negligence of a third person. *Leahy v. Standard Oil Co. of New York*, 352.

Where the evidence, in an action by an employee against his employer for personal injuries, made possible findings that the proximate cause of the action was either of two causes, one of which must have been due to negligence of fellow workmen of the defendant and the other to negligence of the defendant, it was held that it could not be ruled as a matter of law that the plaintiff's injuries were caused by negligence of his fellow workmen. *Joyce v. Power Construction Co.* 496.

### PUBLIC MARKET.

The question, whether under St. 1816, c. 103, and St. 1912, c. 559, Part I, § 63, "the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market," was answered in the affirmative. *Commonwealth v. Clay*, 271.

Before the passage of the above ordinance for nearly one hundred years the premises had been used for a public market place and without charge to the public, but during that period ordinances had been passed relative to the market house and the market, and it was held that no uninterrupted adverse use had been shown which deprived the city of the use or control of property held for the benefit of the public. *Ibid.*

### PUBLIC OFFICER.

In granting locations for street railways, the appropriate boards of towns and cities are public officers and not agents of their respective municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

## PUBLIC SERVICE COMMISSION.

Under the provisions of St. 1913, c. 784, §§ 17, 19-22, 29, the public service commission have power to grant a petition by a street railway corporation to increase its rate of fare between certain adjoining towns so that it shall exceed five cents, although such increase is in abrogation of a condition or contract contained in a grant of a location to the corporation by the selectmen of one of the towns in 1897 to the effect that the fare charged for transportation between any point in that town and any point in the town adjoining never shall exceed five cents. *Arlington Board of Survey v. Bay State Street Railway*, 463.

It was not necessary in the above case to determine whether, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon. *Ibid.*

Under St. 1913, c. 784, § 2 c, the public service commission have power, by an order passed by them to that effect, to compel a telegraph company doing business in this Commonwealth to furnish to a person properly applying for them quotations of the sales upon the New York Stock Exchange by means of a ticker service on the same terms that such quotations are furnished by it to other persons. *Western Union Telegraph Co. v. Foster*, 365.

This right is not limited by provisions of the contract between the New York Stock Exchange and the telegraph company under which the quotations are obtained by that company and it is provided that such quotations shall not be furnished to any subscriber unless "the subscriber shall have been approved by the exchange" and although the person in question was not approved by the exchange as a subscriber. *Ibid.*

In a proceeding under St. 1913, c. 784, § 28, by the public service commissioners to enforce the order of the commission above described it is not necessary that the New York Stock Exchange or its officers and members should be made parties, as, whatever their interest in the subject matter may be, the proceeding deals only with the rights acquired by the telegraph company in the quotations. *Ibid.*

## RAILROAD.

Certain taking by right of eminent domain of a location by a railroad corporation was held not to extinguish a private right of way which crossed the location. *New York Central Railroad v. Swenson*, 88.

Where an employee of a contractor with the acquiescence of a railroad corporation enters upon its property for the purpose of crossing a track to borrow a tool for his employer from the corporation and is struck and injured by a locomotive engine, he cannot recover in an action of tort against the corporation for his injuries so received without proving that his injuries were caused by wanton and reckless misconduct of the defendant or its employees. *Laporta v. New York Central Railroad*, 100.

Action against a railroad corporation under the federal employers' liability act to recover for the death of a freight conductor in the defendant's employ during switching in a freight yard, where it was held that on the evidence the

Railroad (*continued*).

conductor was the only person who could have been found to have been negligent, and that consequently there could be no recovery. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.  
See also NEGLIGENCE, Railroad.

## RECEIVER.

The courts of this Commonwealth have jurisdiction of an action of contract against a resident of this Commonwealth by a receiver of a national bank in Kentucky for the collection of the amount of an assessment made by the comptroller of the currency upon the plaintiff as a shareholder. *Weitzel v. Brown*, 190.

A receiver of a national bank, who has been ordered by the comptroller of the currency "to take all necessary proceedings, by suit or otherwise," to enforce the individual liability of shareholders of the bank under an assessment made upon them by the comptroller, can maintain in his own name as receiver an action against a shareholder for the collection of the assessment. *Ibid*.

## REFERENCE AND REFEREE.

It is a general rule that referees or arbitrators clothed with the power of deciding controverted questions between party and party must be disinterested and impartial unless by the mutual understanding of the parties they or some of them purposely are selected as partisans. *Doherty v. Phoenix Ins. Co.* 310.

In this Commonwealth, in an action upon an award of referees, the award can be impeached on the ground of alleged misconduct of the referees without resorting to a suit in equity to have the award set aside. *Ibid*.

Where the powers of referees are unrestricted by the terms of the reference, their decisions on all necessary questions of law and their findings of fact involved in the determination of the controversy submitted to them are final. If at the hearings before them they make errors as to the admission of evidence or in the scope allowed to counsel in argument, such errors are not reviewable. *Ibid*.

Evidence, at the trial of an action on a fire insurance policy where the defendant sought to impeach the finding of the referees as to the amount of the loss on the ground of corruption of the referees by the plaintiff, upon which it was held that the jury were warranted in finding that the referees had not been influenced improperly and had acted throughout the proceedings in good faith. *Ibid*.

In the case above described it did not appear that a statement of all the evidence introduced by both parties before the referees was offered at the trial, and it was held that the portion of such evidence printed in the record manifestly was insufficient to enable the jury to determine whether the referees committed such gross mistakes of overvaluation as to show misconduct. *Ibid*.

## RELEASE.

Where a judgment debtor pays the sum of \$125 upon an execution against him for \$800 "in order to have the judgment discharged" and the attorney for

the creditor indorses and signs upon the execution an acknowledgment of the receipt of \$125 "in full satisfaction," whereupon the debtor promises orally to pay the balance of \$675, there is no consideration for the creditor's acknowledgment of satisfaction, and the creditor in an action of contract on the judgment may recover the balance of the debt. *Smith v. Johnson*, 50.

### RELIGIOUS SOCIETY.

Construction of a trust created by a deed of land on Bromfield Street in Boston in 1806 for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who might choose to attend worship in the church erected and maintained on the land, and the effect upon the trust of certain decrees in suits relating to it, of certain legislative enactments, and of a sale of the land and a moving of the religious society which formerly had occupied it. *Crawford v. Nies*, 474.

### REPLEVIN.

Mere silence or failure by a buyer of goods to inform their seller of facts relating to the buyer's financial responsibility, which for his own protection the seller ought to know, does not constitute fraud which will enable the seller to avoid the sale and maintain an action of replevin to compel a return of the goods. *Phinney v. Friedman*, 531.

Evidence which was held not to be sufficient for the maintenance of an action of replevin by a seller of goods against the assignee for the benefit of creditors of the buyer, a corporation, to compel the return of the goods on the ground that the buyer purchased them with the actual but undisclosed intention not to pay for them, where it appeared that the treasurer of the corporation, its financial backer, had withdrawn his support the day after the sale. *Ibid.*

But evidence as to a sale thirty days after the treasurer withdrew his support, when the buyer was insolvent, was held to warrant the maintenance of an action of replevin for the return of the goods sold. *Ibid.*

Where, at such a trial the judge orders a verdict for the defendant and, on exceptions by the plaintiff, it appears that the goods were sold in two parcels at dates a month apart, and that the evidence would not warrant a finding for the plaintiff as to the first sale but would warrant such a finding as to the second, the verdict as to the first sale should stand, but a new trial may be had, confined to the question of recovery for the goods included in the second sale. *Ibid.*

### REPORT.

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a judge of the Land Court has no power to report questions of law for determination by this court until the case reported is ripe for the entry of a final decree in the Land Court. *Riverbank Improvement Co. v. Chapman*, 424.

### RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

## RULES OF COURT.

Rule 44 of the Superior Court. *Matter of Carver*, 169.

Rule 45 of the Superior Court. *Ibid*.

## SALE.

### *Rescission and Avoidance.*

Attempt by the buyer of an automobile to rescind the sale by a letter, sent while the car was in a garage, for breach of an oral warranty that the car was in perfect running order, was held to be ineffectual because he did not offer to return or tender the car to the seller and demand the return of the consideration until one month and four days after the date of his letter which was held not to be within a reasonable time after he had knowledge that the warranty was broken. *Skillings v. Collins*, 275.

In the provisions of the sales act relating to rescission for a breach of warranty contained in St. 1908, c. 237, § 69, cls. 3, 4, the word "offer" as used in relation to an offer to return the goods is synonymous with the word "tender." *Ibid*.

If, during ten months while a suit in equity by a purchaser seeking a rescission of the sale of the capital stock of a corporation for fraud of the seller was pending, the plaintiff carried on the business of the corporation and made the enterprise successful, and the plaintiff elected to waive the prayers of the bill relating to rescission, the court, having had jurisdiction in equity when the suit was brought, in a proper exercise of its discretion may retain it solely for the assessment of damages. *Rosen v. Mayer*, 494.

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But evidence as to a sale thirty days after the treasurer withdrew his support, when the buyer was insolvent, was held to warrant the maintenance of an action of replevin for the return of the goods then sold. *Ibid*.

Mere silence or failure by a buyer of goods to inform their seller of facts relating to the buyer's financial responsibility, which for his own protection the seller ought to know, does not constitute fraud which will enable the seller to avoid the sale and maintain an action of replevin to compel a return of the goods. *Ibid*.

Where, at such a trial, the judge orders a verdict for the defendant and, on exceptions by the plaintiff, it appears that the goods were sold in two parcels at dates a month apart, and that the evidence would not warrant a finding for the plaintiff as to the first sale but would warrant such a finding as to the second, the verdict as to the first sale should stand, but a new trial may be had, confined to the question of recovery for the goods included in the second sale. *Ibid*.

*Voidable because Unauthorized.*

Where a stockbroker holds shares of stock belonging to a customer with a general authority, either express or implied, to sell them, he has no authority to sell them to himself without the knowledge and assent of his customer, and, if he does so, the sale is voidable by the customer, although it may have been at auction and the full market price has been paid so that no harm has resulted. *Hall v. Paine*, 62.

*Warranty.*

In the provisions of the sales act relating to rescission for a breach of warranty contained in St. 1908, c. 237, § 69, cls. 3, 4, the word "offer" as used in relation to an offer to return the goods is synonymous with the word "tender." *Skilling v. Collins*, 275.

## SALEM.

The question whether under St. 1816, c. 103, and St. 1912, c. 559, Part I, § 63, "the city of Salem could require a permit and the payment of a fee therefor before one could occupy a stand in the market," was answered in the affirmative. *Commonwealth v. Clay*, 271.

Before the passage of the above ordinance for nearly one hundred years the premises had been used for a public market place and without charge to the public, but during that period ordinances had been passed relative to the market house and the market, and it was held that no uninterrupted adverse use had been shown which deprived the city of the use or control of property held for the benefit of the public. *Ibid*.

## SALES ACT.

In the provisions of the sales act relating to rescission for a breach of warranty contained in St. 1908, c. 237, § 69, cls. 3, 4, the word "offer" as used in relation to an offer to return the goods is synonymous with the word "tender." *Skilling v. Collins*, 275.

## SAVINGS BANK.

In a suit in equity brought by a girl against the executor of the will of her aunt for the amount of a savings bank account in the aunt's name as trustee for the girl, it was held that a finding was justified, if not required, that the account in the savings bank became a completed gift when the plaintiff's aunt first informed her that the original deposit of money in that account was the money that had belonged to the plaintiff's mother, and that the gift was accepted by the plaintiff. *Moore v. O'Hare*, 283.

## SHIP.

Construction of a certain charter party. *Coastwise Transportation Co. v. New England Coal & Coke Co.* 244.

Certain charter party was held to have been performed by the owner, although

Ship (*continued*).

the vessel was lost before the term for which she was chartered had passed.  
*Coastwise Transportation Co. v. New England & Coal Coke Co.* 244.

### SILENCE.

An estoppel may be established by proof of silence when there was a duty to speak. *D'Almeida v. Boston & Maine Railroad*, 452.

### STATE FORESTER.

The State forester, neither by the provisions of St. 1904, c. 409, § 2, nor by Res. 1915, cc. 2, 23, is authorized to cut cord wood or clear brush upon the land of a private person for a price to be paid to the Commonwealth, and by his doing so the Commonwealth is not made subject to the liability of a private person engaged on private business to answer in damages for torts committed by its employees in such work. *Burroughs v. Commonwealth*, 28.

### STATUTE.

#### *Repeal.*

St. 1907, c. 563, § 25, was not repealed by St. 1909, c. 268, re-enacting St. 1907, c. 563, § 1, with a single amendment placing an adoptive parent on an equality with a natural parent. *New England Trust Co. v. White*, 332.

### STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

### STATUTES CITED AND EXPOUNDED.

See page 755.

### STOCKBROKER.

In an action of contract against a stockbroker by one of his customers for the value of certain shares of stock which against the plaintiff's objection and protest the defendant from time to time had sold, sending to the plaintiff immediately after each sale notice of the sale and an account of it, it was held that the plaintiff could recover only nominal damages, as he might have purchased the shares at substantially the prices at which they were sold by buying them back on receiving notice of each sale. *Hall v. Paine*, 62.

It also was held that the rule as to computing damages by the highest intermediate value of the shares is not applied to such a case in this Commonwealth. *Ibid.*

Where a stockbroker holds shares of stock belonging to a customer with a general authority, either express or implied, to sell them, he has no authority to sell them to himself without the knowledge and assent of his customer, and, if he does so, the sale is voidable by the customer, although it may have been at auction and the full market price has been paid so that no harm has resulted. *Ibid.*

Although one who employs a stockbroker to buy or sell shares of stock for him on a stock exchange is bound by the established usages of that stock exchange so far as they are not illegal or contrary to sound public policy, whether he knows of them or not, he is not bound by a usage of the stock exchange which permits a broker to buy for himself without the knowledge of his customer shares of stock which such customer has entrusted to him for sale. *Hall v. Paine*, 62.

One who employs a broker to sell for him shares of stock on a stock exchange is bound by a usage of the stock exchange, which also is embodied in an express rule, permitting brokers to purchase shares of stock from their customers when acting, not for themselves personally, but as brokers for other customers; and, where such sales were made at market prices and there is nothing to indicate that the selling customer was not dealt with fairly, he cannot avoid the sale by showing that he did not know of the usage or rule. *Ibid*.

One, who has the right to avoid a sale of shares of stock made for him by a broker to the broker himself personally under a usage of the stock exchange unknown to the customer, must exercise his right of avoidance within a reasonable time after he learns of the facts or after he might learn of the facts by inquiry under circumstances that would put a man of ordinary intelligence upon inquiry. *Ibid*.

In the above case, where the plaintiff had received and retained the defendant's check for the balance of his account as stated by the defendant, it was held that it could not be ruled as matter of law that the plaintiff had affirmed the sales which he sought to avoid. *Ibid*.

In an action against a stockbroker by a customer, where the plaintiff has established the fact that he exercised his right of avoidance of such sales of shares of stock within a reasonable time, the plaintiff, if he shows that the defendant made certain sales of the plaintiff's stocks to himself personally, can recover the difference between the value of the stocks when sold and their value when the sales were made known to and were repudiated by him, with interest from that date. *Ibid*.

Deposit by the owner of shares in a foreign corporation, with a stockbroker as additional margin to secure his account, of his certificate with his signature on the back but not to a power of attorney to transfer and without compliance with the requirements of the foreign law in regard to transfers of shares, was held not sufficient to enable a trust company to whom the stockbroker had pledged the shares to maintain a bill in equity to compel a transfer of shares to it, and upon a cross bill by the original pledgor the trust company will be ordered to deliver the certificate to him. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

Action against a stockbroker under R. L. c. 99, § 4, see **WAGERING CONTRACTS**.

### STOCK EXCHANGE.

Effect upon a contract of employment of a stockbroker by his customer of rules and usages of the stock exchange. *Hall v. Paine*, 62.

### STREET COMMISSIONERS.

Of Boston, see **BOSTON**.



### STREET RAILWAY.

Validity, construction and effect of an agreement by a news company to save harmless a street railway company "from all loss, cost or damage on account of injuries received by newsboys in its [the news company's] employ or wearing its badge while boarding, riding upon or leaving the cars of the street railway company, or while on or about its tracks."

*Bay State Street Railway v. North Shore News Co.* 323.

In granting locations for street railways, the appropriate boards of towns and cities are public officers and not agents of their respective municipalities. *Arlington Board of Survey v. Bay State Street Railway*, 463.

The Legislature has the power to change or to abrogate, to the loss of the municipalities, the terms and conditions contained in locations granted to street railway companies by the appropriate boards of towns and cities, although such grants of locations are phrased in the form of contracts and secure valuable financial obligations to the municipalities. *Ibid.*

And the public service commission, acting as public officers under St. 1913, c. 784, §§ 17, 19-22, 29, have power to do so by raising a rate of fare stated in the location. *Ibid.*

By the enactment of the above named statute the Legislature waived whatever conditions or contracts were made by the appropriate municipal boards, who were public officers, and the street railway corporations in the granting and accepting of the locations, and therefore street railway corporations are not estopped from seeking from the public service commission permission to establish fares which are in excess of those agreed upon in such conditions or contracts. *Ibid.*

It was not necessary in the above case to determine whether, under the provisions of the above statute, the public service commission has power to abrogate a condition or contract contained in such a grant of location so that the rate of fare would be less than that therein agreed upon. *Ibid.*

See also appropriate subtitle under NEGLIGENCE.

### SUFFOLK COUNTY APPORTIONMENT COMMISSIONERS.

See APPORTIONMENT COMMISSIONERS.

### SUPERIOR COURT.

A judge of the Superior Court is not disqualified from hearing a petition for the disbarment of an attorney at law by reason of such judge's membership in the bar association that instituted the proceedings. *Matter of Allin*, 9.

The Superior Court, both under R. L. c. 165, § 44, and inherently, has power to remove an attorney at law from his office, not only because of misconduct directly connected with his official duties, but also for such criminal or gross wrongdoing as makes manifest his unfitness to exercise the duties of his office. *Matter of Carver*, 169.

## SUPREME JUDICIAL COURT.

St. 1905, c. 263, did not take away the power of the Supreme Judicial Court under R. L. c. 173, § 52, to allow an amendment changing a suit in equity in that court into an action at law. *Kerr v. Whitney*, 120.

Under St. 1909, c. 33, and St. 1911, c. 275, the Supreme Judicial Court in allowing such an amendment either may order that an action of contract into which a suit in equity has been amended shall be removed to the Superior Court for trial or may order that after the amendment the action of contract shall be tried in the Supreme Judicial Court. *Ibid*.

In an action, where the genuineness of the signature of a deceased person was a material issue, this court was of opinion that testimony of a certain witness that the signature in question was genuine should have been excluded on the ground that the witness did not have sufficient knowledge to qualify him as a witness on the subject, but, under the circumstances, it was held that the error had not affected injuriously the substantial rights of the adverse party and that therefore under St. 1913, c. 716, § 1, the exception to the admission of the evidence should be overruled. *Noyes v. Noyes*, 125.

It was said that it was not necessary in the present case to decide whether, in a case where it appears to be necessary to prevent a miscarriage of justice, a point not theretofore raised at any state of the proceedings may be acted on by this court to accomplish a right result in accordance with the law. *Ibid*.

Leave to amend given by this court under St. 1913, c. 716, § 3, *Noble v. Brooks*, 288.

In a proceeding under St. 1913, c. 784, § 28, by the public service commission to enforce an order directing a telegraph company to cease certain acts of discrimination, where the company attempted to justify its conduct by reason of a contract which it had with the New York Stock Exchange, it was held that it was not necessary that the New York Stock Exchange or its officers or members should be made parties. *Western Union Telegraph Co. v. Foster*, 365.

## SURETY.

In an action by a surety company against the executor of the will of one of two trustees, upon an agreement of the two trustees indemnifying the company from loss caused by its being on their individual bonds, to recover for loss sustained by the company by reason of misappropriation by the co-trustee of the defendant's testate, the defendant contended that negligence of the plaintiff barred recovery, but it was held that, the contract being one of guaranty given for the protection of the plaintiff, it owed no duty to the defendant's testator, who was one of the joint guarantors, to keep him advised as to the dealings with the trust property by his co-trustee and co-guarantor. *American Surety Co. of New York v. Vinton*, 337.

Under the provisions of the above agreement as to premiums to be paid, it was held that no premium should be paid on the bond of the misappropriating trustee after his removal, and none on that of the other trustee after his death. *Ibid*.

In the action described above one of the defendants held assignments of the interests of the two trustees as beneficiaries of the income of the trust fund

*Surety (continued).*

as security for their indebtedness to him, and it was held that this defendant as assignee stood in no better position than his assignors. *American Surety Co. of New York v. Vinton*, 337.

### SURVIVAL OF ACTION OR SUIT.

Where a deceased employee at the time of an injury that resulted in his death had no family, and his mother, who was his only next of kin, was wholly dependent upon his earnings for support and filed a petition for compensation under St. 1911, c. 751, Part II, § 7, and where, after an award had been made by an arbitration committee from which an appeal to the Industrial Accident Board was pending, such dependent died, it was held that such dependent's right to future compensation under the statute did not survive. *Murphy's Case*, 592.

It also was held that the right that had accrued for compensation from the date of the injury to the time of the dependent's death did survive. *Ibid.*

A weekly payment awarded to be made to a dependent under the workmen's compensation act comes to an end when the dependent dies. *Ibid.*

### TAX.

#### *Change of Date of Assessment.*

Under a lease made for a term of twenty years from May 1, 1893, wherein the lessee covenanted to pay "all the taxes . . . , except betterments, whether in the nature of taxes now in being or not which may be assessed upon or payable for or in respect of the said premises or any part thereof during the said term," it was held that, by reason of St. 1909, c. 440, which changed the day of assessment from May 1 to April 1, the lessee must pay the tax assessed on April 1, 1913, although the result was that he had to pay the taxes for twenty-one years under a twenty year lease. *Welch v. Phillips*, 267.

#### *Conflict of Taxing Jurisdictions.*

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

And interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words. *Ibid.*

St. 1909, c. 490, Part I, § 23, cl. 5, displays no such intention. *Ibid.*

Whether a statute showing such an intention by plain and unequivocal words would be constitutional was not decided. *Ibid.*

*Validity.*

The mere fact, that the Commonwealth by St. 1909, c. 490, Part I, § 12, subjects some, but not all, of the land of which it is the proprietor to taxation when it is leased, is not a violation of c. 1, § 1, art. 4 of the Constitution of Massachusetts, requiring that all property taxes must be "proportional and reasonable," and violates no constitutional right of any citizen. *Boston Fish Market Corp. v. Boston*, 31.

For the same reasons that statute is not in contravention of the clause of the Fourteenth Amendment of the Constitution of the United States assuring "equal protection of the laws." *Ibid.*

*Exemption.*

The general exemption from taxation of the property of the Commonwealth in St. 1909, c. 490, Part I, § 5, cl. 2, does not apply to those portions of the Commonwealth Flats that are "leased for business purposes," which are expressly subjected to taxation by § 12. *Boston Fish Market Corp. v. Boston*, 31.

*On Legacies and Successions.*

St. 1907, c. 563, § 25, was not repealed by St. 1909, c. 268, re-enacting St. 1907, c. 563, § 1, with a single amendment placing an adoptive parent on an equality with a natural parent. *New England Trust Co. v. White*, 332.

*On Trust Property.*

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

And interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words. *Ibid.*

The provisions of St. 1909, c. 490, Part I, § 23, cl. 5, display no such legislative intention. *Ibid.*

In the above case the beneficiary under the trust was a resident of this Commonwealth, but a tax on one third of the trust fund was assessed to the trustee resident here and not to the beneficiary, and it was stated that it therefore was not necessary to consider the aspect of the statute which would have been presented if the tax were assessed to the beneficiary. *Ibid.*

Whether a statute showing a plain and unequivocal intention of imposing a tax under the above circumstances would be constitutional, was not considered in this case. *Ibid.*

*Pledged Property.*

For the purposes of the interpretation of the tax act, pledged property, tangible as well as intangible, is deemed to be owned by the one in possession, whether this is a domestic or a foreign corporation or a natural person. *Boston Loan Co. v. Commonwealth*, 181.

*Excise on Corporation.*

Under St. 1909, c. 490, Part III, § 43, the tax commissioner when ascertaining, for the purpose of imposing the excise authorized by the statute, the value of the corporate franchise of a domestic corporation engaged in the business of lending money at interest secured by pledges of articles of personal property of which it holds possession while the general title to the articles is in its customers, in computing the maximum limit of twenty per cent of the value of the things named in the statute must include under the word "merchandise" the articles of personal property thus held in pledge. *Boston Loan Co. v. Commonwealth*, 181.

Under St. 1909, c. 490, Part III, §§ 28, 33, the excise "on all premiums received for insurance" by a domestic (not life) insurance company is imposed on the gross amount of the premiums and not merely on their net amount after deducting such dividends, if any, as the board of directors of a mutual company may decide to repay to its policy-holders. *American Mutual Liability Ins. Co. v. Commonwealth*, 299.

*On Partnership Property.*

Proper apportionment, in an accounting among partners, of a tax upon the partnership property. *Hunter v. Larrabee*, 218.

*Of leased Land on Commonwealth Flats.*

Where the lessee of certain land on Commonwealth Flats uses the premises for the purpose of subletting portions of them to persons who deal in fish, the premises are "leased" to it "for business purposes," although it does not itself engage in a mercantile business; and therefore, under the provisions of St. 1909, c. 490, Part I, § 12, the premises are subject to taxation. *Boston Fish Market Corp. v. Boston*, 31.

*Tax Sale.*

Where land is sold to the town in which it lies for non-payment of taxes and seven years later, the land not having been redeemed, the unredeemed land is sold by the town under St. 1909, c. 490, Part II, § 68, the later sale is not in any accurate sense a tax sale, and its validity or invalidity cannot affect the title of the town as the purchaser at the previous tax sale. *Welch v. Haley*, 261.

And accordingly the title given by the deed of the collector of taxes of the town after the later sale is not impaired by the fact that the assessment of taxes required by R. L. c. 13, § 66, to be made after the town bought the land "as though the same were not so taken or purchased" was only in fact made in the last one of the seven intervening years. *Ibid.*

A purchaser at a sale of land for the collection of taxes, who at the time of the sale has no interest in the land other than that derived at the tax sale, gets a new title in fee unincumbered by an attachment previously placed upon the land in an action brought against the person who owned it at the time of the tax sale. *Davis v. Allen*, 551.

And if such purchaser afterwards conveys that title to one who, after the tax sale, acting for himself and in good faith, had purchased all the right, title and interest of him who had owned the land at the time of the tax sale, such second purchaser also gets a title unincumbered by the attachment or by a sale under an execution and levy following it. *Ibid.*

#### *Redemption from Tax Sale.*

In a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem land from a tax sale which occurred more than two but less than six years before the commencement of the suit, if it appears that the defendant, who purchased the land at the tax sale, did not reside in the town where the land was and had not appointed the agent nor given the notice required of such a non-resident owner of a tax title by St. 1909, c. 490, Part II, § 46, a decree should be entered for the plaintiff if the general equities disclosed by the evidence require it. *Glazier v. Everett*, 184.

Circumstances under which it was held that the general equities in such a suit required a decree for the plaintiff. *Ibid.*

Trustee, appointed by methods provided for in a declaration of trust, was held to succeed under the provision of R. L. c. 147, § 6, to a right to maintain a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem the land from a sale made after the death of the original trustee for the collection of a tax assessed before the property was conveyed to the original trustee. *Ibid.*

Proper decree for the plaintiff in such a suit where it appears that since the tax sale the land has been taken by eminent domain by the town for water supply purposes and that a claim for damages resulting from such taking is unsatisfied. *Ibid.*

#### *Non-Resident Purchaser at Tax Sale.*

Suit under St. 1909, c. 490, Part II, § 76, to redeem from a tax sale which occurred more than two years before the commencement of the suit was maintained because the purchaser, a non-resident, had failed to comply with St. 1909, c. 490, Part II, § 46, as to notice and appointment of an agent and the general equities favored the plaintiff. *Glazier v. Everett*, 184.

#### *Collector's Deed.*

St. 1911, c. 370, providing that the deed of a collector of taxes conveying land sold for non-payment of taxes, if recorded within thirty days, "shall be *prima facie* evidence of all facts essential to its validity," establishes a rule of procedure which applies to deeds executed in pursuance of sales made before as well as of those made after its enactment. *Welch v. Haley*, 261.

Where a deed given by a collector of taxes in pursuance of a sale for non-payment of taxes describes well known land by the numbers of lots on a de-

Tax (*continued*).

scribed plan filed in the registry of deeds, giving the number of the book of plans and the number of the plan, the description is sufficient for reasonable identification of the land conveyed, which is all that is required. *Welch v. Haley*, 261.

In a tax collector's deed, in which the essential facts in regard to the sale in pursuance of which the deed was given are recited, a mistake of twenty-five cents in favor of the delinquent taxpayer in the computation of interest at the sale for non-payment of taxes and a mistake of five cents against such delinquent in the determination of his interest in the surplus following a later sale of the unredeemed land do not make either the sale or the deed voidable. *Ibid*.

Under the provision of R. L. c. 13, § 43, that the deed of a collector of taxes given pursuant to a sale for non-payment of taxes "shall convey . . . all the right and interest which the owner had in the land when it was taken for his taxes," the fact that the deed purports to convey the whole of the real estate described instead of all the right, title and interest which the owner had does not affect the title given by the deed and therefore does not invalidate the deed. *Ibid*.

#### TELEGRAPH COMPANY.

Under St. 1913, c. 784, § 2 c, the public service commission have power, by an order passed by them to that effect, to compel a telegraph company doing business in this Commonwealth to furnish to a person properly applying for them quotations of the sales upon the New York Stock Exchange by means of a ticker service on the same terms that such quotations are furnished by it to other persons. *Western Union Telegraph Co. v. Foster*, 365.

This right is not limited by provisions of the contract between the New York Stock Exchange and the telegraph company under which the quotations are obtained by that company and it is provided that such quotations shall not be furnished to any subscriber unless "the subscriber shall have been approved by the exchange" and although the person in question was not approved by the exchange as a subscriber. *Ibid*.

In the decision stated above it was pointed out that the contract between the New York Stock Exchange and the telegraph company which was in force when the order of the public service commission was issued was made when St. 1913, c. 784, was in effect. *Ibid*.

#### TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

#### TICKER SERVICE.

Power of the public service commission to compel a telegraph company in the Commonwealth to furnish ticker service without discrimination. *Western Union Telegraph Co. v. Foster*, 365.

#### TOWNS.

See MUNICIPAL CORPORATIONS.

## TRUST.

*What constitutes.*

A deed of land recited that the consideration was paid by B "as he is Trustee of a voluntary association known as the" O Company. The grant was to B "Trustee" and the habendum to B, "Trustee, and his successors theirs and assigns." A declaration of trust by B as trustee of the O Company, an unincorporated association of individuals formed for the purpose of dealing in land, was recorded in the same registry of deeds as was the deed. The declaration of trust was not referred to specifically in the deed. It was held that the conveyance was intended to be to B in his capacity as trustee for the association. *Glasier v. Everett*, 184.

In a suit in equity brought by a girl against the executor of the will of her aunt for the amount of a savings bank account in the aunt's name as trustee for the girl, it was held that a finding was justified, if not required, that the account in the savings bank became a completed gift when the plaintiff's aunt informed her that the original deposit of money in that account was the money that had belonged to the plaintiff's mother, and that the deed of gift was accepted by the plaintiff. *Moore v. O'Hare*, 283.

In the same case it was held that the plaintiff's wages, which had been collected by the defendant's testatrix for a period of seven years with the declared purpose of holding them for the plaintiff and some of which had been placed in the bank account, were impressed with a trust that was not terminated by their being deposited in the savings bank fund, nor by their being mingled with other money of the defendant's testatrix. *Ibid.*

Provisions of a "trust receipt" given to a bank by an importer of hides were held not to operate as a trust in products manufactured from the hides and money received from the sale of a part of them which had been mingled with other products and other money so that they were not susceptible of separation and identification. *Peoples National Bank v. Mulholland*, 448.

*Construction.*

Under the provisions of a certain will whereby trustees were directed to retain a sum sufficient to pay certain annuities and to distribute the rest of the estate "among my said nephews and nieces . . . share and share alike, the issue of any such deceased nephew or niece, taking its parent's share by right of representation," and, upon the death of the survivor of the annuitants, to pay over all sums remaining to the "same parties and in like manner," it was held that at the death of the testator the interest in remainder in the trust fund vested in the "said nephews and nieces" then living. *Linscott v. Troubridge*, 108.

In a provision in a will for an ultimate distribution of a trust fund "to my grand-nephews and grand-nieces, if any, who may then be living," it was held that the words "then be living" referred to the grand-nephews and grand-nieces of the testatrix alive at the death of the last survivor of life beneficiaries and that the gift then vested in them, although possession was postponed until they should arrive respectively at the age of twenty-one years. *Dexter v. Attorney General*, 215.



Trust (*continued*).

Accordingly it was ordered that upon their respective arrivals at that age an equal distribution of the fund should be made to the grand-nephew, the grand-niece and to any issue of a married niece of the testatrix who might be born within nine months after the death of the last survivor of the life beneficiaries. *Dexter v. Attorney General*, 215.

#### *Termination.*

An action of tort or contract, with a declaration containing counts for the conversion of money and for money had and received and upon an account annexed, may be maintained although the plaintiff, upon the same facts, might have relief in equity for the termination of a trust and an accounting. *Flye v. Hall*, 528.

#### *Succession of Trustee.*

Trustee, appointed by methods provided for in a declaration of trust was held to succeed under the provision of R. L. c. 147, § 6, to a right to maintain a suit in equity under St. 1909, c. 490, Part II, § 76, to redeem the land from a sale made after the death of the original trustee for the collection of a tax assessed before the property was conveyed to the original trustee. *Glazier v. Everett*, 184.

#### *Constructive.*

In a suit in equity, by the administrator *de bonis non* of an estate against a bank, in which a former administrator of the estate had kept funds of the estate, for an accounting as to certain of the funds which, it was alleged, the former administrator misappropriated under such circumstances that the defendant was chargeable as a constructive trustee, where it appeared that the bank had no actual knowledge or suspicion that the administrator was misappropriating funds of the estate, it was held that the defendant was not bound to account for the amount of checks on the account of the estate deposited to the administrator's personal account on the days following certain overdrafts where other checks drawn upon other sources more than sufficient in amount to take up the overdraft were deposited on the same day. *Allen v. Fourth National Bank*, 239.

In the same suit it was held that under the circumstances the defendant was not bound to account to the plaintiff for the amount of certain checks on the account of the estate which made possible certification of checks on the administrator's personal account. *Ibid.*

Nor for the amount of a check drawn by the administrator upon the account of the estate and deposited in his personal account to make good a check on his personal account which he had delivered to the defendant to take up a personal draft upon him sent to the defendant by a bank in another State for collection. *Ibid.*

#### *Charitable.*

Under the provisions of a deed delivered and recorded in 1806, it was held that a valid charitable trust was created by the deed, whereby the legal title to the land was vested in the trustees for the use and benefit "of the members of the Methodist Episcopal Church in the United States of America" who

might choose to attend worship in the church erected and maintained on the land. *Crawford v. Nies*, 474.

In further construction of the same deed, it was held that the legal title to the property remained in the trustees appointed by the deed and in their successors chosen in accordance with its provisions, that it was not affected by the statutes relating to the incorporation of the trustees, and that the purposes for which the trust was to be administered were not changed by the conduct of the trustees and the beneficiaries. *Ibid.*

And when, by a decree in a suit in equity, in which all parties were represented and which was brought to determine the rights and powers of the trustees under the above described deed, it was ordered that the incorporated trustees should convey the property to certain persons named as trustees in the decree who should hold it subject to the trusts set forth in the original deed, and such conveyance was made, thereafter the trustees named in the decree became the only persons authorized to execute the trust, over which the court as a court of equity had acquired and retained full jurisdiction. *Ibid.*

The Legislature has no power to terminate such a trust. *Ibid.*

If, under a special statute providing that the trustees appointed by the court as above described might sell the property, and that the net proceeds of sale should be held and disposed of by the trustees subject to different trusts than those specified in the original deed, a sale is made, the trustees thereafter continue to hold the proceeds of the sale subject to the trusts specified in the original deed and do not hold them subject to the trusts described in the statute. *Ibid.*

It was held that a bill in equity could not be maintained by the minority of the trustees above described to remove the majority of the board from office because they were unwilling to accede to the views and desires of the plaintiffs and ninety per cent of the members of the society which formerly worshipped in the church. *Ibid.*

And, under the circumstances, it was held that no occasion was shown for an application of the doctrine of *cy pres*. *Ibid.*

In the same case it was stated that, if the trustees neglected or refused to execute the trust or abused their powers, the Attorney General on his own initiative or at the relation of those who were beneficially interested might petition for their removal and also have relief in equity for an accounting. *Ibid.*

And it also was stated that, if the trustees were uncertain as to their powers and duties or were unable to agree among themselves as to them, they might ask for instructions, making the Attorney General a party defendant. *Ibid.*

#### *Taxation.*

A State may establish a taxing jurisdiction over a trust fund of personal property which was created by a will of one of its residents for the benefit of a non-resident, which is administered by trustees appointed by its own courts, only one of whom is a resident within its borders and who have power to act only as a body, and the evidences of title, securities and assets of which by agreement among the trustees are kept within its borders in the possession of the resident trustee and continue subject to the control of its courts. *Newcomb v. Paige*, 516.

Trust (*continued*).

And interstate comity requires that, where a sister State has established such a jurisdiction, a statute of this Commonwealth should not be construed as displaying a legislative intent to subject such trust property to taxation here unless such an intention is shown by plain and unequivocal words. *Newcomb v. Paige*, 516.

In the above case the beneficiary under the trust was a resident of this Commonwealth, but a tax on one third of the trust fund was assessed to the trustee resident here and not to the beneficiary, and it was stated that it therefore was not necessary to consider the aspect of the statute which would have been presented if the tax were assessed to the beneficiary. *Ibid*.

The provisions of St. 1909, c. 490, Part I, § 23, cl. 5, display no such legislative intention. *Ibid*.

Whether a statute showing a plain and unequivocal intention of imposing a tax under the above circumstances would be constitutional, was not considered in this case. *Ibid*.

#### *Equity Jurisdiction over Trust Matters.*

A trustee cannot maintain a bill in equity for instructions upon a question relating to the past administration of his trust. *Hill v. Moors*, 163.

A suit in equity cannot be maintained by a trustee to establish the validity of the titles to certain parcels of real estate conveyed by him to various persons who are not parties to the suit, and to have the deeds which he gave as trustee and his acts as trustee ratified and confirmed. *Ibid*.

It was held that a bill in equity could not be maintained by the minority of the trustees who held certain property for purposes of religious worship to remove the majority of the board from office because they were unwilling to accede to the views and desires of the plaintiffs and ninety per cent of the members of the society which formerly worshipped in the church. *Crawford v. Nies*, 474.

In the same case it was stated that, if the trustees neglected or refused to execute the trust or abused their powers, the Attorney General on his own initiative or at the relation of those who were beneficially interested might petition for their removal and also have relief in equity for an accounting. *Ibid*.

And it also was stated that, if the trustees were uncertain as to their powers and duties or were unable to agree among themselves as to them, they might ask for instructions, making the Attorney General a party defendant. *Ibid*.

#### TRUSTEE PROCESS.

It was not disputed that an attempted service by trustee process upon an alleged trustee merely by serving the writ upon another as his agent is insufficient. *Reynolds v. Missouri, Kansas & Texas Railway*, 253.

One who is summoned as trustee by trustee process is a party to the action, and an order discharging him is a final judgment so far as he is concerned, he having no interest in the principal controversy. Therefore an appeal from such an order may be entered in this court without waiting until the action is disposed of on its merits and is ready for judgment. *Ibid*.

The above decision was confined strictly to the facts of the case and does not

narrow the general rule as to appeals from interlocutory orders illustrated in *Weil v. Boston Elevated Railway*, 216 Mass. *Reynolds v. Missouri, Kansas & Texas Railway*, 253.

Under R. L. c. 189, § 69, if a person attempted to be summoned by trustee process as trustee is discharged by an order of the court because the service upon him was insufficient, he may be awarded costs and counsel fees by the order of discharge. *Ibid.*

Where an attachment by trustee process has been dissolved by the giving of a bond with sufficient sureties approved by a master in chancery after notice and hearing given and conducted in pursuance of the requirements of R. L. c. 167, §§ 116, 117, the creditor of the trustee who was the defendant in the action in which the attachment by trustee process was made immediately may sue his debtor who was summoned as trustee without any further demand after the dissolution of the attachment. *Nessery v. Beard*, 305.

There is nothing in the Revised Laws nor elsewhere which requires that one who has been summoned as trustee by trustee process should receive any notice of an application by the defendant to a magistrate to dissolve the attachment. *Ibid.*

#### UNIFORM STOCK TRANSFER ACT.

It was said that, although the provision of the uniform stock transfer act contained in St. 1910, c. 171, § 9, relating to the transfer of certificates of shares does not apply to a transfer of shares in such a foreign corporation, yet the general rule of equity applicable to the case is stated correctly in § 9. *Boston Safe Deposit & Trust Co. v. Adams*, 442.

#### UNLAWFUL INTERFERENCE.

The provisions contained in St. 1914, c. 778, § 2, declaring that "in construing this act" the right to labor and to make and modify contracts to work "shall be held and construed to be a personal and not a property right," and prohibiting the granting of an injunction to enforce such a right "where no irreparable damage is about to be committed upon the property right of either" the employee or the employer, are unconstitutional and void. *Bogni v. Perotti*, 152.

#### USAGE.

Effect upon a contract of employment of a stockbroker by his customer of rules and usages of the stock exchange. *Hall v. Paine*, 62.

Certain evidence as to a custom of parties in their dealings with each other as to certain mortgages and notes was held under the circumstances rightly to have been excluded. *Webb v. Lothrop*, 103.

#### WAGERING CONTRACTS.

Allegations in the declaration in an action of contract against a stockbroker in which the plaintiff seeks to recover sums paid to the defendant for transactions upon margins, that the plaintiff "had no intention to perform said

contract" to purchase certain stocks upon margin, and that the defendant "had reasonable cause and well knew that the plaintiff had no intention to actually perform said contract," are not the equivalent of, nor can they be construed into, an affirmative allegation of the fact, which is a prerequisite to the maintenance of an action under R. L. c. 99, § 4, that at the time of making the contract the plaintiff intended that there should be no actual purchase or sale. *Matthys v. Hornblower*, 248.

In such an action the plaintiff's knowledge or ignorance of how much of the money deposited by him "was put on each security" was held not to be material to the determination of the issue of his intention at the time of the making of the contract or of the issue of the defendant's reasonable cause to believe that the plaintiff had an intention that there should be no actual sale or purchase. *Ibid.*

If, at the trial of such an action, the plaintiff testifies that he told the defendant that he wished to trade on margin, buying when he desired and selling when he desired, taking the market quotation, and if there was a rise, to sell and to settle his account on the rise and fall of the market, and that he did not want the stock certificates, a finding is warranted that the plaintiff intended at the time of the contract that there should be no actual purchase or sale. *Ibid.*

Findings of an auditor to whom was referred such an action that all the purchases and sales ordered by the plaintiff "were actual transactions," and that in "every case, whether of purchase or sale, a check for the full amount duly passed from or to the defendant as the case might be," were held not inconsistent with certain other findings of the auditor regarding the defendant's method of doing business by clearing house methods for all his customers. *Ibid.*

The findings of the auditor in the above described case being the only evidence upon the issue to which they related, a verdict was held properly to have been ordered for the defendant because as a matter of law he had sustained the burden of proving under R. L. c. 99, § 4, that all the purchases and sales upon orders placed with him by the plaintiff were "actual." *Ibid.*

In this action against a stockbroker with offices in Boston, New York and Chicago, to recover under the laws of Massachusetts certain amounts of money paid to the defendant as margins upon wagering contracts, where it appeared that the money was paid and the orders were given in Chicago, where the plaintiff lived, it was not determined but it was assumed that R. L. c. 99, § 4, applied, it being held that under the circumstances the defendant had done nothing to render him liable under the statute. *Ibid.*

#### WAIVER.

Special appearance by a non-resident was not waived when, having excepted to a ruling that he could not defend only as to his property that was attached but must answer generally, he answered generally. *Cheshire National Bank v. Jaymes*, 14.

In a suit in equity by a lessor against the lessee and his assignee for the benefit of creditors to enforce the rights of the plaintiff under the lease which had been terminated by the lessor in accordance with its terms, it was held

that, under the circumstances, whether the plaintiff elected under the provisions of the lease to claim damages or to claim indemnity was a question of fact with the burden of proof resting on the plaintiff, and that whether the plaintiff by letting a part of the premises to the former lessee waived his claim for damages also was a question of fact. *Gardiner v. Parsons*, 347.

A foreign corporation which in a suit in equity has filed a plea to the jurisdiction of the court, denying that it has been served with process lawfully, was held not to have waived this plea by taking part in an argument upon the question of whether a preliminary injunction ought to issue. *Reynolds v. Missouri, Kansas & Texas Railway*, 379.

By the enactment of St. 1913, c. 784, §§ 17, 19-22, 29, the Legislature waived whatever conditions or contracts were made by the appropriate municipal boards, who were public officers, and the street railway corporations in the granting and accepting of locations, and therefore street railway corporations are not estopped from seeking from the public service commission permission to establish fares which are in excess of those agreed upon in such conditions or contracts. *Arlington Board of Survey v. Bay State Street Railway*, 463.

Conduct of a minority stockholder, who, after he had made a demand in writing of the corporation for the value of his shares under St. 1903, c. 437, § 44, and while he was seeking to ascertain the real value of the shares, discovered fraud of the majority stockholders lessening the value of the shares, but agreed with them to submit the matter of the appraisal of the value of his shares to certain arbitrators under the statute, was held under the circumstances not to be a binding election to waive his right to maintain a suit in equity to compel an accounting and restitution by the majority stockholders. *Cole v. Wells*, 504.

Waiver of right to appeal from a decree in a suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

## WARRANTY.

See that subtitle under SALE.

## WATER COMPANY.

A contract made by a water company to furnish water for use on a certain property at the same rate charged to the former owner of the property, which was a fixed sum for the year, and "that the rate would continue the same for the present," was held to mean that the rate charged the former owner would be continued until changed by the company. *Scott v. Dedham Water Co.* 398.

And therefore, after a notification from the company that the fixed rate thereafter would be treated as a minimum charge and that all water used in excess of a certain number of gallons would be charged for at meter rates, the water taker was bound to pay according to the changed rate, and, if he refused to do so, the company, under a right reserved by the regulations printed on its bills, might shut off the water for non-payment of water rates. *Ibid.*

### WATER SUPPLY.

Validity of certain taking, by the city of Newburyport under St. 1908, c. 403, for the purposes of its water supply, of a right to flow. *Lunt v. Newburyport*, 48.

### WAY.

#### *Private.*

Creation; prescription.

Where in a deed of a lot of land the only reference to an alleged private street is that a boundary of the lot is described as beginning on a certain avenue at the corner of a street, when in fact there is no street and no indication of a street, and the only indication that a street ever was contemplated is the fact that two posts were placed by the grantor on the line of the avenue about forty feet apart, which posts remained there only a short time, there is nothing to estop one, who owns the adjoining land under a subsequent deed from the same grantor and who purchased it after the posts had disappeared, from denying the existence of an alleged private street forty feet wide over his land. *Ralph v. Clifford*, 58.

Where it appears that, at the time the landowner claiming such a right of way purchased his land, the grantor showed to him and to at least one other person a plan or blue print on which a street forty feet wide was marked or traced upon the adjoining land in accordance with the claim of the right of way, but there is no evidence of such a plan, this cannot affect the rights of the owner of the adjoining land, who had no notice of this incident when he purchased his land and who can be charged with notice only of what was disclosed by the records in the registry of deeds or of what appeared upon the surface of the earth. *Ibid.*

The acquisition of a right of way over a passageway by its continuous use during a period of more than twenty years is not impaired by a temporary obstruction of the way during that period by means of barrels and planks placed there by a stranger without authority from or ratification by the owner of the land over which the right of way is acquired. *Dornsee v. Lyons*, 256.

#### Extinguishment.

If an instrument of taking by right of eminent domain of a certain location by a railroad corporation contains no language to show that a private way which crosses the location is extinguished, the mere facts that, upon the map which the corporation filed with the county commissioners is the statement "This location covers and includes all the land lying between the lines tinted red on said map," and that the "lines tinted red" crossed black lines designated as the lines of the private way, do not show that the private way where it crossed the location was extinguished by the taking. *New York Central Railroad v. Swenson*, 88.

#### *Public.*

#### Relocation.

Acts of the road commissioners of a town which, it was held, constituted as matter of law an entry and taking possession of a way for the purpose of

construction within the meaning of R. L. c. 48, § 92, and also within the meaning of § 28 of the same chapter after an order of relocation had been passed by the county commissioners, so that a petition for the assessment of damages by a jury filed more than one year thereafter was dismissed. *Goulding v. Concord*, 292.

#### Traffic rules.

Article 3, § 1, of the street traffic regulations of the city of Boston, which provides that "Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession," has no application to an automobile truck of the fire department which, in charge of a captain of the department, is upon a street merely in order that an employee of its manufacturer may instruct the fireman in its operation. *Lynch v. Boston Elevated Railway*, 93.

#### Use for private purpose.

In this Commonwealth a right granted to a private person to use a public street for a private purpose is a mere license revocable at pleasure. *Union Institution for Savings v. Boston*, 286.

A permit granted by the board of street commissioners of the city of Boston under St. 1913, c. 680, to erect and maintain a post with a clock thereon set in the sidewalk of a public street of that city, without limitation as to time and without express reservation of a power to revoke the permit, is a revocable license, and the right granted does not become a contract by the erection of a post and clock in accordance with its terms. *Ibid.*

#### WITNESS.

##### *Cross-examination.*

At the trial of an action of tort against a charitable corporation for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant in a wood yard operated by it, the superintendent of the defendant, who was one of its incorporators, after being called by the plaintiff and questioned as to the general management of the defendant's enterprises, may be permitted to state in cross-examination by counsel for the defendant the purposes for which the wood yard was established and maintained. *Conklin v. John Howard Industrial Home*, 222.

And, where it does not appear that the superintendent, although an employee and a member of the corporation, had shown bias or prejudice in his testimony, the presiding judge was held properly to have ruled that the plaintiff, who had called him as a witness, should not be permitted to cross-examine him. *Ibid.*

Where in cross-examination a plaintiff testifies that her answers to interrogatories propounded under the statute, which were different from her statements made in direct examination, are correct and absolutely true notwithstanding anything that she has testified to on the witness stand, this is not to be treated as a mere instance of conflicting or inconsistent statements made upon cross-examination, and the plaintiff is to be bound by the statement last given as the truth. *Sullivan v. Boston Elevated Railway*, 405.



Witness (*continued*).

It is not justifiable to found an inference nor an argument upon a palpable verbal slip made by a witness in one of his answers upon his cross-examination. *Gillis v. New York, New Haven, & Hartford Railroad*, 541.

#### *Competency.*

At the trial of an indictment for larceny by false pretences in procuring money by false representations as to the genuineness of signatures upon a promissory note, one of the persons whose name was on the note was a competent witness to testify as to whether the signature purporting to be his looked like his handwriting. *Commonwealth v. Carver*, 42.

#### *Contradiction.*

The fact that a witness had testified for the plaintiff before an auditor was held not to make him the plaintiff's witness at the trial before the jury, and therefore that portions of his testimony before the auditor properly were admitted in contradiction of his statements as a witness by deposition, where it appeared that after the hearing before the auditor he had become employed by the defendant. *Nelson v. Imperial Water Proof Co. Ltd.* 388.

Testimony of the defendant as a witness in a proceeding in the Probate Court, which tended to contradict her testimony at the current trial, was admissible in evidence. *Flye v. Hall*, 528.

#### *Impeachment.*

Impeachment by the Commonwealth under R. L. c. 175, § 24, of one of its own witnesses as to some of her statements at the trial of an indictment for procuring an abortion. *Commonwealth v. Turner*, 229.

#### *Hostile Witness.*

It was held that under the circumstances the discretion of the judge presiding at the trial of an indictment for procuring an abortion as to permitting the Commonwealth to cross-examine or lead its own witness, the nurse, could not be said to have been exercised so as manifestly to have prejudiced the defendant. *Commonwealth v. Turner*, 229.

At the trial above described, the jury were instructed that they should disregard all of the nurse's testimony unless they were satisfied beyond a reasonable doubt of the identity of the defendant as the doctor who called at her house when the woman was there. *Ibid.*

Impeachment by the Commonwealth under R. L. c. 175, § 24, of the nurse as to some of her statements at the trial of an indictment for procuring an abortion. *Ibid.*

#### *Absence of Witness.*

Comment, by a judge in his charge to the jury as to inferences that might be drawn from the absence of an employee of the defendant as a witness, as to which it was held that, while the judge well might have omitted the instruction, it could not be held to have been erroneous. *Robinson v. Doe*, 319.

In an action for personal injuries caused by a horse of the defendant when

ridden by a minor son of the defendant, where there was no evidence that the defendant's son was acting as the servant or agent of his father and the defendant did not call his son as a witness, it was held that no inference could be drawn against the defendant from his failure to call his son as a witness when there was nothing for him to refute. *Poirier v. Terceiro*, 435.

At the trial of an action by an employee against his employer for personal injuries alleged to have been caused by a defect in an automobile truck of the defendant, no inference unfavorable to the defendant can be drawn from the fact that he failed to call as witnesses the employees of a garage where the truck was kept, such employees being equally available to the plaintiff. *Card v. Turner Centre Dairying Association*, 525.

## WORDS.

- "All annual taxes." See *Boston Fish Market Corp. v. Boston*, 31, 35.
- "Any property . . . or interest." See *Hopedale Manuf. Co. v. Clinton Cotton Mills*, 193, 197.
- "Business purposes." See *Boston Fish Market Corp. v. Boston*, 31, 33.
- "By-laws." See *Kilgour v. Gratto*, 78, 80.
- "Certificate." See *Boston Safe Deposit & Trust Co. v. Adams*, 442, 446.
- "Disband." See *McCarty v. Cavanaugh*, 521, 523 n., 524.
- "I am content." See *Herrick v. Waitt*, 415, 417.
- "Incumbrance." See *Levenberg v. Johnson*, 297, 298, 299.
- "May." See *Walsh v. Commonwealth*, 39, 40.
- "Merchandise." See *Boston Loan Co. v. Commonwealth*, 181, 182.
- "Municipal." See *Boston Fish Market Corp. v. Boston*, 31, 36.
- "Offer." See *Skillings v. Collins*, 275, 277.
- "Person who is aggrieved." See *Ensign v. Faxon*, 145, 150.
- "Secede." See *McCarty v. Cavanaugh*, 521, 523 n.
- "Service." See *Western Union Telegraph Co. v. Foster*, 365, 374.
- "Shall." See *Walsh v. Commonwealth*, 39, 40.
- "Sharp curve." See *Halloran v. Boston Elevated Railway*, 280, 281.
- "Then be living." See *Dexter v. Attorney General*, 215, 216, 217.
- "Value of the stock." See *Cole v. Wells*, 504, 513.

## WORKMEN'S COMPENSATION ACT.

*Persons to whom Act Applies.*

Under the workmen's compensation act the Industrial Accident Board may be warranted in finding that a longshoreman, whose fingers were frozen while he was at work in his regular occupation of unloading a steamer at a pier when the thermometer stood at four degrees below zero, was exposed "to materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker on the date" in question, and that the injury was one arising out of his employment within the meaning of St. 1911, c. 751, Part II, § 1. *McManaman's Case*, 554.

Circumstances surrounding the finding of the dead body of a plumber's assistant five minutes after he was seen driving a horse and wagon of his employer were held to leave the cause of his falling from the wagon, if he did fall, purely a matter of conjecture so that there was no evidence on which it

could be found that the death of the employee was the result of an injury arising out of his employment within the meaning of St. 1911, c. 751, Part II, § 1. *Sanderson's Case*, 558.

Circumstances attending the lending to a contractor in a city by a master teamster of "a teamster to take some concrete window-sills, wheelbarrows, picks and shovels out to M the next morning," upon which, upon a claim under the workmen's compensation act for injuries to the teamster it could not be found that the teamster was in the employ of the contractor at the time of his injury. *Comerford's Case*, 571.

But it was held that, under St. 1911, c. 751, Part III, § 17, such transportation might be found to have been a part of the work of the contractor comprised in his contract, and, if so found, compensation under the statute might be awarded to the teamster who sustained an injury arising out of and in the course of his employment in such transportation. *Ibid*.

### *Dependency.*

A married woman, who at the time of her husband's death was living apart from him merely on account of his inability to obtain and perform sufficiently remunerative work to provide a home for his wife and child, cannot be found to have been living apart from him for justifiable cause within the meaning of St. 1914, c. 708, § 3 (a) in the amendment of § 7 of St. 1911, c. 751, Part II. *Veber's Case*, 86.

Where in the presentation of a claim under the workmen's compensation act by the alleged dependent widow of an employee who at the time of his death was living apart from him by reason of his inability to provide a home for his wife and child, it appears that the employee during a married life of more than twelve years paid doctors' bills, grocery bills, bought clothes for the child and gave money to his wife amounting in all to between \$200 and \$300, it is the duty of the Industrial Accident Board to determine in accordance with the fact under St. 1911, c. 751, Part V, § 2 and under the last paragraph of Part II, § 7 (c) as amended by St. 1914, c. 708, § 3, whether the widow was dependent upon her husband at the time of the injury that caused his death. *Ibid*.

A weekly payment awarded to be made to a dependent under the workmen's compensation act comes to an end when the dependent dies. *Murphy's Case*, 592.

Where a deceased employee at the time of an injury that resulted in his death had no family, and his mother, who was his only next of kin, was wholly dependent upon his earnings for support and filed a petition for compensation under St. 1911, c. 751, Part II, § 7, and where, after an award had been made by an arbitration committee from which an appeal to the Industrial Accident Board was pending, such dependent died, it was held that such dependent's right to future compensation under the statute did not survive. *Ibid*.

It also was held that the right that had accrued for compensation from the date of the injury to the time of the dependent's death did survive, and that no person was in existence to whom an award under the statute to take effect upon her death could be made. *Ibid*.

It here was intimated, although not decided, that, where an employee dies from an injury within the workmen's compensation act, leaving a widow

and children by such widow under eighteen years of age, and the widow subsequently dies while a petition by her for compensation under the act is pending or after an award has been made upon it, an order directing payments to be made to the widow may be reviewed by the Industrial Accident Board under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, and a new award may be made to such minor children under St. 1911, c. 751, Part II, § 7, of payments for the period subsequent to the death of the widow. *Murphy's Case*, 592.

#### *No Survival of Right of Dependent to Compensation.*

A weekly payment awarded to be made to a dependent under the workmen's compensation act comes to an end when the dependent dies. *Murphy's Case*, 592.

#### WRIT OF ERROR.

R. L. c. 193, § 12, does not deprive this court of its power, when error in the sentence is disclosed and it is apparent that the defendant has suffered enough for the crime of which he was convicted, to reverse the judgment of sentence and discharge the prisoner. *Walsh v. Commonwealth*, 39.

Application of the foregoing principle where a sentence, directing the payment of a fine of \$50 and ordering that the defendant stand committed until the fine was paid, was imposed upon a complaint for a violation of R. L. c. 91, § 113, in having taken clams within prohibited bounds, for which no fine larger than \$10 should have been imposed. *Ibid*.

#### WRONGDOER WITHOUT REMEDY.

Collusion of a woman with her husband in permitting him to procure a divorce in another State in which neither of them had a domicile, after which her former husband married another woman, and other conduct of hers, were held to preclude her upon the death of her former husband from setting up such collusion and the want of jurisdiction of the court that granted the divorce and claiming the rights of a widow in her former husband's estate. *Chapman v. Chapman*, 427.

#### WRONGFUL REGISTRATION OF LAND.

An action of contract under R. L. c. 128, §§ 95, 96, to recover compensation out of the assurance fund for an alleged wrongful registration of a parcel of land belonging to the plaintiff, cannot be maintained by one whose only title to the land is derived from a deed dated and delivered after the decree of registration complained of. *Briggs v. Treasurer & Receiver General*, 46.

A deed of land, in which the description by metes and bounds is followed by the words "Together with all our rights in said Channel of Island End River if any," conveys the rights of the grantors in the estuary named, but does not convey a right to compensation under R. L. c. 128, § 95, for the loss of land that was a part of a dam across Island End River through a wrongful registration of such land by a decree of the Land Court. *Ibid*.



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